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**In the Supreme Court of the United States**

**OCTOBER TERM, 1941.**

**No. 332.**

THE WILLIAMS MANUFACTURING COMPANY,  
*Defendant-Petitioner,*

v.

UNITED SHOE MACHINERY CORPORATION,  
*Plaintiff-Respondent,*

**BRIEF FOR DEFENDANT-PETITIONER.**

H. A. TOULMIN, JR.,  
ROWAN A. GREER,  
JAMES B. O'DONNELL,  
*Counsel for Petitioner.*

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## **BRIEF FOR DEFENDANT-PETITIONER.**

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### **THE OPINIONS BELOW.**

This cause is before this Court upon the petition of defendant-petitioner, The Williams Manufacturing Company, by reason of a writ of certiorari to review the decision (121 F. (2d) 273, R. Vol. I, p. 503) and decree (R. Vol. I, p. 501) of the United States Circuit Court of Appeals for the Sixth Circuit, directing that the decree (R. Vol. I, p. 485) of the United States District Court for the Southern District of Ohio, holding the McFeely patent 1,558,737, in suit, valid as to claims 6, 23, 42, 85 and 91, be affirmed. The findings of fact, conclusions of law and opinion of the District Court were filed July 21, 1939, and are printed at pages 477-485 of Vol. I, of the Record herein; and the decision of the District Court is reported in 29 F. S. 1015. The decree of the District Court was filed July 21, 1939. The Court of Appeals opinion (121 F. (2d) R. Vol. I, p. 502), was filed June 27, 1941. The decree of the Court of Appeals (R. Vol. I) was entered June 25, 1941.



## JURISDICTION.

The certiorari petition was filed on or about August 6, 1941, and the writ granted on or about October 20, 1941. This case is here on such writ of certiorari under the provisions of Sec. 240-A of the Judicial Code (28 U. S. Sec. 347).

## THE ISSUE.

The primary issue is **extension of monopoly\*** by re-patenting an old combination to redominate a trade for another seventeen years, contrary to the principles announced by this Court in *Bassick v. Hollingshead*, 298 U. S. 415, and *Lincoln v. Stewart Warner Corp.*, 303 U. S. 545.

## ERRORS ASSIGNED AND TO BE ARGUED.

1. **Extension of Expired Monopoly.** That the Circuit Court of Appeals for the Sixth Circuit, in holding the second McFeely patent No. 1,558,737 (R. Vol. II, p. 2) valid over the prior invention and patent of McFeely, No. 1,129,881 (R. Vol. II, p. 266, expired March 2, 1932), has rendered a decision in conflict with the principles of the decisions of this Court in *Bassick v. Hollingshead*, 298 U. S. 415, and *Lincoln v. Stewart Warner*, 303 U. S. 545, prohibiting the extension of monopoly of an expired patent by the substitution of mechanical details, already old in the art, in a second patent in an identical basic mechanism as in the first expired patent,—a mere substitution or improvement of parts in an old combination.

2. **Aggregation: Extension of Monopoly.** That the Circuit Court of Appeals for the Sixth Circuit in upholding the validity of McFeely patent No. 1,558,737, which merely aggregates old adjusting features with an old combination, has rendered a decision in conflict with the prin-

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\* Where not otherwise stated, emphasis ours.



principles applied in such cases as *Grinnell v. Johnson*, 247 U. S. 426.

**3. Commercial Success of Prior Art Unnecessary for Anticipation.** That the Circuit Court of Appeals for the Sixth Circuit in upholding the validity of McFeely patent No. 1,558,737, has rendered a decision in conflict with the decision of this Court and the principles therein as applied in such cases as *Smith v. James*, and *Smith v. Hall*, 301 U. S. 216, to the effect that a prior machine constitutes anticipation, even though it is commercially unsuccessful and is incapable of operating to the fullest range of capacity to adopt it for commercial operation. The decision of the Court of Appeals herein is in conflict with the principles announced in the decision of this Court in *Smith v. James*, *supra*, in which the Hastings prior use was held to anticipate the Smith patent notwithstanding the Hastings prior use did not meet with commercial success.

**4. Public Importance: Effect of Remonopoly on the Public Interest.** That this case involves the payment of royalties or rentals to United Shoe Machinery Corporation by shoe manufacturers on more than 1200 machines and is, therefore, one of great importance to the public and hundreds of shoe manufacturers upon whom the respondent levies tribute through royalties or rentals. The principle of extension of monopoly by the method employed in drafting these patents, if not corrected, will extend indefinitely the monopoly of patents of this class over the shoe industry.

#### **SUMMARY OF ARGUMENT AND STATEMENT OF FACTS.**

The primary issue here is the extent of the right to repatent an expired monopoly affecting the entire shoe industry. This has resulted in the levying of a heavy tax upon the public for using an expired combination. The ex-

tension of monopoly of the first McFeely patent by the second McFeely patent in suit has been effected by claiming three preliminary adjustments in combination with the old heel seat lasting machine of the first patent.

Petitioner was defendant in the District Court, where the respondent prevailed on both patents in suit, the District Court holding the two patents in suit valid and infringed. (R. Vol. I, pp. 477, 485, 29 F. S. 1015.) The Circuit Court of Appeals for the Sixth Circuit reversed the District Court, in part, holding the McFeely patent No. 1,558,737, valid and infringed and the Hoyt patent No. 1,508,394, invalid for unlawful extension of monopoly. Judge Elwood Hamilton of that Court dissented. (R. Vol. I, pp. 501, 502, 122 F. (2d) 273.) The primary issue in both courts was the extension of monopoly by the respondent, the United Shoe Machinery Corporation, in repatenting old expired combinations of its expired patents in new patents in which adjustments, old *per se* in the art, were substituted in old combinations and were reclaimed in such broad combinations present in the old basic machine covered by respondent's own expired patents.

This extension of monopoly was effected in this manner. The Bill of Complaint (R. Vol. I, p. 1) was originally founded upon three patents: Pym patent No. 1,368,968, of February 15, 1921, expiring February 15, 1938, covering bed lasters without the superimposed automatic tackers (R. Vol. II, p. 440); the second<sup>1</sup> McFeely patent No. 1,558,737, granted October 27, 1925, expiring October 27, 1942, covering bed lasters in combination with automatic tackers (R. Vol. II, p. 2); and Hoyt patent No. 1,508,394, granted September 16, 1924, expiring September 16, 1941, for another improved form of combined bed laster and automatic tackers. (R. Vol. II, p. 42.) Respondent withdrew its

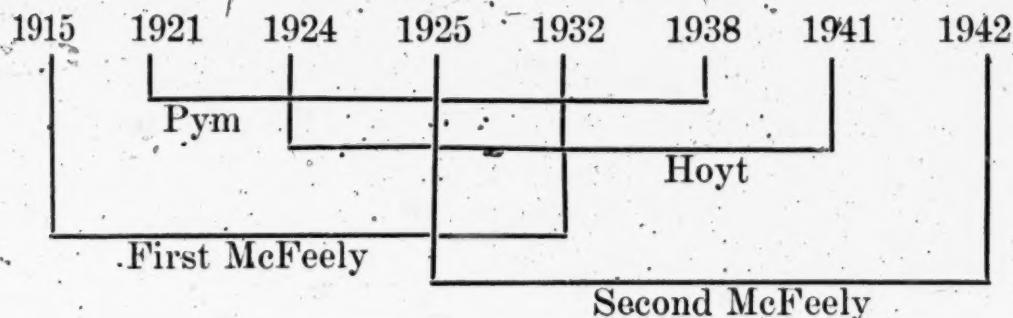
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<sup>1</sup> The first McFeely patent No. 1,129,881 is the primary anticipatory reference whose expired monopoly is repatented by the second McFeely patent No. 1,558,737 in suit.

suit on the expired Pym patent before trial. (R. Vol. I, p. 486.)

The second McFeely patent in suit was abandoned by its owner, the United Shoe Machinery Corporation, in the Patent Office on the 15th day of July, 1921, and renewed on the 24th day of May, 1922. (Def. Ex. F-2.) If it had not been so abandoned, it would have issued and now be expired.

The pattern for the extension of monopoly by overlapping patents on heel seat lasting machines of the respondent is shown in the following diagram of dates of issue and expiration of patents:



The United Shoe Machinery Corporation, respondent, owned the principal prior patent, the first McFeely patent No. 1,129,881, issued March 2, 1915, expiring March 2, 1932. (R. Vol. II, pp. 268, 283.) This patent covered the complete combination of a bed laster and automatic tackers for the heel seat lasting of shoes. It is practically identical with the second McFeely patent except for the substitution in the second patent of modified forms of the same preliminary adjustments as in the first patent. The machine of the first patent was built by the United Shoe Machinery Corporation and placed in the plant of the Victor Shoe Company, where it operated under commercial conditions successfully, lasting shoes of various sizes, and was acclaimed before the United States Patent Office, by affidavit from the employees of the United Shoe Machinery Cor-

poration, including an affidavit of McFeely\* himself, as a pioneer advance, successful commercially, and the first McFeely patent was granted accordingly. (R. Vol. I, pp. 471-6, filewrapper physical Exhibit—Def. Ex. H-2.)

In the District Court the respondent, United Shoe Machinery Corporation, took the position that the machine of the first McFeely patent had never been built and was not a commercial machine. And that the improvements in the second McFeely patent were the difference between failure and success. (R. Vol. I, p. 396, etc.) This proof was promptly challenged by the petitioner who produced, as soon after the trial as it could make an investigation and before the decision of the District Court and before argument, the certified copy of the filewrapper of the First McFeely patent, containing affidavits of respondent's employees, filed in the United States Patent Office, swearing that the machine of the first McFeely patent had been successfully and commercially used on **various sizes of shoes**. (Opinion of Court of Appeals, R. Vol. I, pp. 509-10.) Respondent then filed an affidavit with the District Court admitting the truth as to the commercial operation of the machine made in accordance with the first McFeely patent. (R. Vol. I, pp. 475-6.) The District Court rejected this evidence as being offered too late, refusing to consider it. (R. Vol. I, pp. 478-9.) The Circuit Court of Appeals for the Sixth Circuit gave this evidence consideration, saying: **"Although the machine (first McFeely) successfully lasted shoes of specific sizes, it proved incapable of operating satisfactorily upon a range of sizes large enough to adapt it for commercial operation in the ordinary shoe factory."** (R. Vol. I, pp. 509-10.)

The differences claimed by respondent as to the second McFeely patent over the first to enable the second machine to operate on a greater range of sizes are:

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\* It was shown in the record that prior to the bringing of this action, that McFeely had died, and as a consequence, it was impossible to have him testify in this case.



(a) **Sliding heel band adjustment** before the lasting operation for the in and out movement of the shoe. (Old in prior art patents, R. Vol. II, pp. 114, 122, 134, 172, 384, 440.)

(b) **Means for preliminary adjustment of the wipers or tackers** before the lasting operation to accommodate a greater variety of sizes of shoes. (Old in prior art patents, R. Vol. II, pp. 114, 122, 134, 140, 222, 238, 240.)

(c) **Means for adjusting the amount of vertical movement of the hold-down** for the adjustment of the height of the shoe in the machine, before the lasting operation. (Old in prior art patents, R. Vol. II, pp. 232, 440.)

These three adjustments are old *per se* in this art and have been used in numerous heel seat lasting machines shown in the above expired patents.

Such adjustments do not in any way affect the operation of the other elements in the claims, for which reason the claims are also void as aggregations. The adjustments may or may not be used; and if used, are always operated **before** the lasting machine starts operating. That these three adjustments are added features to the old combinations in the claims is emphasized by the findings of fact filed by plaintiff-respondent, in the District Court and adopted by that Court. In Finding 4 (R. Vol. I, p. 478); it is stated that the McFeely "claims in suit are directed **specifically** to certain features of construction which render the machine capable of operation on a wide range of sizes and shapes of shoes." This, of course, refers to the three adjustments mentioned above. In finding 5 (R. Vol. I, p. 478) special reference is made to the "preliminary manual adjustment" of the tacker-wiper claims 6 and 85. In finding 6 (R. Vol. I, p. 478) special reference is made to the "sliding heel band adjustment" of claims 23 and 91. In finding 7 (R. Vol. I, p. 478) points out that the machine



set forth in claim 42 has manually adjustable means for varying the amount of vertical movement of the hold-down.

### **The Decision of the Circuit Court of Appeals.**

The Circuit Court of Appeals (Vol. I, p. 502, and reported in 121 F. (2d) 273), followed the decision of the District Court in sustaining the second McFeely patent as valid and infringed. It failed to follow this Court's doctrine on extension of monopoly, as laid down by this Court in *Bassick v. Hollingshead*, 298 U. S. 415, and *Lincoln v. Stewart Warner*, 303 U. S. 545. It reversed the District Court as to the Hoyt patent for extension of monopoly. Judge Elwood Hamilton of the Circuit Court of Appeals dissented without a dissenting opinion.

### **THE FIRST AND SECOND McFEELY PATENTS COMPARED.**

The almost complete identity between the machines of these two patents is the factual basis for claiming invalidity of the second McFeely patent. The claimed differences by respondent rest in (a) improved adjustments for the vertical hold-down; (b) the predetermined positioning of the wiper plates in advance of wiping, and (c) the in and out adjustment of the heel band which grasps the heel of the shoe to hold it during lasting, **all of such adjustments being for the purpose of accommodating the machine to different sizes and shapes of shoes.** It is immaterial whether such adjustments were mere substitutions of one adjustment for another already old in the art, or the adjustments themselves were *per se* new and better. In any event, there is no excuse to reclaim the old heel seat lasting machine by either substituting one adjustment for another or adding an improved adjustment. To permit this means there would be no end of monopoly—no date when a patent on the old combination expired. In Appendix B we have quoted the claims in issue, printing in black type the ad-

justments which have been inserted in each claim to the sixty year old combination of wiper plates, means to move them, tackers and means to support the last and shoe in a heel clamp.

While the machinery is complicated in heel seat lasting machines yet the functions are simple. The heel band must be kept in close engagement with the heel by moving it in and out by pressing it on the sides and on the corners or bight of the band while the back of the band must be supported. The wipers must wipe back and forth to break down the leather over the bottom of the sole; and then the wipers must be withdrawn to permit the tacking unless the tacking is done through the wipers. **In order to adjust for** different sizes of shoes, shapes of lasts, and rights and lefts, it has been necessary from the very first machines to make predetermined adjustment of the wipers with or without tackers prior to the wiping and tacking operation to accommodate different sizes of shoes. It is no recent discovery that you must adjust any machine to fit it to different shoe sizes, lasts and rights and lefts of shoes as we have always had such variations. The First McFeely patent says:

#### **Improvements in Production and Quality:**

“By the use of this machine the temporary securing of the parts of the upper in assembled relation is rendered unnecessary as the lasting is effected while the machine holds the parts in proper assembled relation so that **an important saving of time and expense is effected and a greatly improved quality of work is obtained** by performing on this machine operations heretofore separately performed by different machines as distinct steps in the manufacture of the shoe.” (p. 1, ll. 49-60.)

#### **Automatic:**

“Another very important feature of this invention consists in **automatically operating heel seat lasting**

mechanism, with or without heel seat tacking mechanism which is also operated automatically." (p. 1, ll. 75-9.)

#### **Hold-Down Adjustment: Prevention of Drag Back of Leather:**

"Novel features of this invention will be found \* \* \* in the provision for movement of the shoe so prepared backwardly into the heel embracing band of the lasting mechanism and the actuation of that band further to conform the upper materials to the contour of the heel portion of the last while the upper is so held under strain; in crimping or **overwiping mechanism** constructed and arranged to adapt itself to the shape of the last; in automatic operating mechanism by which **overwiping mechanism** is caused to act repeatedly on the same portion of the shoe; in provision for automatically changing the relative altitudes of the wipers and the shoe during the lasting operation; in the gang tacking mechanism by which the heel seat portion of the shoe is fastened; \* \* \*." (p. 1, ll. 80-105.)

#### **Heel Band Adjustments for Sizes:**

"The end portions of the cords are bent outwardly over the swiveled heads 51 of blocks 52, pivoted upon the front arms of angle levers 54, and are attached to separate springs 55 which are **independently adjustable** by threaded anchors 56. A lining 58 of leather, rubber, felt or other suitable material is arranged within the bands 50 and distributes the pressure of the bands without interfering with their relative conforming movement to adapt them to the contour of each last when they are put under tension by the actuation of the levers 54." (p. 4, ll. 7-19.)

"A back stop 69 is adjustably mounted in position to limit the backward movement of the shoe into the elastic heel band which is effected by the connection to the jack post through the rod 43. This insures a predetermined positioning of the shoe lengthwise with relation to the operating parts of the machine. The back stop is forked to center the shoe laterally independently of the band and thus assist in positioning the shoe later-

ally with relation to the lasting and tacking mechanism." (p. 4, ll. 67-79.)

The purpose of this adjustment for different sizes is stated as follows:\*

"In Fig. 18 the back stop is shown as formed on a rack bar adjustable by a shaft 690 having a handle at the side of the machine with a pawl in it to engage a locking ratchet 691 having marked on it graduations indicating the proper adjustment **FOR DIFFERENT SIZES**. The ratchet can be adjusted to position the graduations for different groups of sizes such as men's, women's or children's sizes." (p. 4, ll. 79-88.)

This is particularly significant as later it will be noted that it was claimed at the trial by the plaintiff that the second McFeely was the first patent adaptable to different sizes of shoes and the first McFeely patent was not so adaptable. Later this was changed to a claim of a full range of sizes *after* the first McFeely filewrapper was produced.

#### **Predetermined Wiper Adjustment.**

The adjustment of the wiper in advance of its movement in order to bring about a predetermined adjustment for a predetermined movement is described as follows in the first McFeely Patent:

"This arm 83 has a yielding connection with the wiper plate 72 provided by the following arrangement: The arm 83 has a beveled end face which abuts against a similar face on a displaceable member 84 that is pivoted to a slide 85 and by which the wiper 72 is

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\* The broad combination with adjustments was even claimed in the first McFeely patent. See such claims as claim 167, which reads:

"A lasting machine having in combination, lasting means, a back stop to position the shoe and means to adjust the back stop **for shoes of different sizes including provision for indicating the correct adjustment for particular sizes.**"



actuated through the stud 840 and sub-slide 850. The member 84 has a beveled upper face at 86 upon which rests a beveled plunger 87 carried in the slide 85 and pressed upon by a heavy spring 88, see Figs. 2 and 13. The spring plunger maintains the members 83, 84 normally in the relation shown in Fig. 13, but permits the member 84 to turn and the movement of the wiper 72 to cease when resistance to such movement overbalances the tension of the spring 88. **Normally however the wiper will overcome any resistance offered by the work and complete its stroke into predetermined position over the last bottom to wipe the upper into position to be tacked.**" (p. 5, ll. 2 to 24.)

The movement of the wipers, after this setting of the predetermined adjustment of the spring 88, to adapt them to different sizes of shoes and rights and left's, is described thus:

"Simultaneously with this forward movement motion is transmitted through the angle levers 90 and the described, independently yielding, connections to close the side wipers and the corner wipers or links 71 inwardly over the heel seat, thus gathering the upper inwardly in substantially radial lines over the heel seat. The provision for effecting the forward movement and the inward movement from each side of the shoe **through independently yielding connections permits the wiping or breaking down means to adapt or conform itself to the contour of each shoe** and this is facilitated by the flexible connection 71 between the plates 70, 72, which act at the ends and back of the heel seat. **The independently yielding connections also facilitate the adaptation of the wipers to the shape and position of right and left shoes which differ greatly when made on crooked lasts.**" (p. 5, ll. 91-111.)

The first McFeely patent supported the last and shoe in the inverted position on the (yellow)\* jack/shaft. To

\* See patent drawings in Appendix A, comparing the McFeely patents. The colors identify the same parts.



determine the vertical position of the shoe, the first McFeely provided an adjustable (blue) hold-down. This was adjusted through the laterally adjustable cam wedge 100 controlled by the set screw 104. During the operation of lasting, the last and shoe was first held in a lower position while the first wiping operation took place; and it was then elevated to a higher position for the final wiping operation.

This is described in the patent as follows:

“It is intended that the **first or essentially breaking down advance shall take place with the shoe in a lower position than the second** or wiping in and ironing down movement. Accordingly, means for controlling the vertical position of the shoe is provided and is connected with **means for changing that vertical position** automatically between the two actuations of the upper overworking means \* \* \*.” (p. 5, ll. 124-130; p. 6, ll. 1-3. Also see p. 6, ll. 23-35.)

The Court of Appeals was under the impression that the second McFeely was the first to provide means of preventing the wipers from dragging the leather backwardly during their movements back and forth over the leather of the heel to bend the leather down. (R. Vol. II, p. 268.) This is not correct, as will be seen from the following as to the first McFeely patent where this idea was described and even claimed.

In order to prevent the wipers from dragging the leather back, mechanism was provided, plus the adjustable hold-down, to so position the shoe vertically as to prevent this. The patentee saying:

“This is to depress the shoe from the wipers and to relieve the pressure of the wipers and **prevent them from dragging over the lasted and tacked upper in their final retraction.**” (First McFeely, p. 6, ll. 38-43.) (R. Vol. II, p. 268.)

This arrangement was *so claimed* in the first McFeely patent (claim 189).\* (R. Vol. II, p. 303.)

### Heel Band Adjustment.

The heel band 58 in the first McFeely patent was supported upon resilient cords that held the sides and end of the band in yielding engagement snugly against the back of the heel. The tension on these cords was adjusted by the nuts 56. The pressure of the last and shoe against these bands and the heel clamp push the clamp against the adjustable back stop 69, which served to push the heel band forwardly. While there was no physical connection between the two, they moved together. These adjustments are described by McFeely in his first patent thus:

"The end portions of the cords are bent outwardly over the swiveled heads 51 of blocks 52, pivoted upon the front arms of angle levers 54, and are attached to separate springs 55 which are **independently adjustable** by threaded anchors 56." (First McFeely, p. 4, ll. 7-12.)

And the adjustment of the back stop, a part of the heel band adjustment, is described thus:

"A back stop 69 is adjustably mounted in position **to limit the backward movement of the shoe** into the elastic heel band which is effected by the connection to the jack post through the rod 43. **This insures a predetermined positioning of the shoe lengthwise with relation to the operating parts of the machine.** The back stop is forced to center the shoe laterally independently

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\* "A machine of the class described having, in combination, last supporting means, heel lasting wipers constructed and arranged to work an upper into lasted position over the entire heel seat portion of the shoe at a single operation and having stock flattening faces extending substantially continuously around the heel seat, and power operated mechanism to advance and retract the wipers and **positively to effect a relative movement of the wipers and the last perpendicularly to the plane of said stock flattening faces to relieve the drag of the wipers during their retracting movement.**"

of the band and thus assist in positioning the shoe laterally with relation to the lasting and tacking mechanism. In Fig. 18 the back stop is shown as formed on a rack bar adjustable by a shaft 690 having a handle at the side of the machine with a pawl in it to engage a locking ratchet 691 **having marked on it graduations indicating the proper adjustment for different sizes. The ratchet can be adjusted to position the graduations for different groups of sizes such as men's, women's or children's sizes.**" (First McFeely, p. 4, ll. 67-88.)

The First McFeely not only described the three adjustments for vertical position and in and out position of the last, and the predetermined positioning of the wipers, but even claimed such features. We submit that McFeely with his first patent's expiration had enjoyed to the full a monopoly on machines of this class with such adjustments for the same purpose of making shoes of various sizes—and nowhere in this or the later patent does he speak of a limitation on sizes that could be handled by the first McFeely construction.

### **THE McFEELY PATENT IN SUIT.**

The second McFeely patent on its face admits that it is a mere improvement upon the first patent in certain details. It claims no new result—no new ability to work on a greater range of sizes than the first patent.

**"This invention relates to lasting machines for use in the manufacture of boots and shoes, and is herein illustrated in its application to a machine for lasting the heel ends, or the heel seats, of shoes, the drawings showing a machine of the same general type as that illustrated in United States Letters Patent No. 1,129,881 granted upon my application on March 2, 1915, in which type of machine it is one of the objects of the invention to effect improvements."** (p. 1, ll. 12-22.)\*

\* See Appendix A where the drawings of the two McFeely patents are arranged in parallel to show the complete identity of the machines except in minor mechanical details. The colors identify the same parts.

It then says as to the several improved adjustments:

"For the accomplishment of this object the invention provides a novel organization of means for effecting relative movement between the shoe and a shoe end embracing band to seat the shoe in the band." (p. 1, ll. 39-43.)

"The invention also provides, as an important feature, novel means for controlling the shoe in respect to movement in directions transverse to the plane of the shoe bottom." (p. 1, ll. 85-89.)

"As a further feature, the invention provides a novel construction of end embracing wiper mechanism including, among other improvements, a novel and convenient means for effecting relative adjustment of the wipers to conform them substantially to the shape of different shoes, for example to the different contours of the heel ends of right and left shoes." (p. 2, ll. 42-50.)

Thus the improvements consisted primarily of an improved heel band adjustment, an improved wiper adjustment, and an improved hold-down adjustment. These adjustments should have been, of course, claimed *per se* if they were new instead of claiming them as elements of the entire combination which was otherwise old.

The differences here in "detail" between the two patents are the substitutions for the rubber cords embracing the heel band with a detached pusher in the first McFeely for the attached pusher and heel band construction old in such patents as Eaton, No. 596,323; Brock, No. 601,935; Lombard, No. 524,445; Snow, No. 946,708; Keyes, No. 1,023,854; Brock, No. 1,188,616 and Plant, No. 958,280. The back of the band is supported by a clip 62 in exactly the same manner as in the patents to Brock, No. 1,188,616; Keyes, No. 1,023,854 and Plant No. 958,280. The pusher 66 of the second McFeely patent actuated by a pinion 88 (Figure 2) is the same as the pusher 54 actuated by the pinion 690 (Figure 2) of the first McFeely patent. **The resulting operation is the same.** The (green) wipers in both cases operate in



# IDENTITY OF OPERATION AND CONSTRUCTION OF THE McFEELY PATENTS.

## First McFeely, No. 1,129,881 Predetermined Adjustment of the Wipers. (R. Vol. II, p. 266.)

(1) The limitation of movement inwardly of the wiper is secured by primary adjustment. This is effected by adjusting spring 88 and plunger 87. (p. 3, ll. 2-55.)

## Adjustment of Wipers to Different Sizes of Shoes

(2) Independently yielding connections to close the side wipers and corner wipers are provided through the flexible connections 71 to facilitate the adaptation of the wipers to the shape and position of right and left shoes which differ greatly when made on crooked lasts. (p. 3, ll. 82-116.)

## Adjustment of Heel Band to Different Shoe Sizes.

(3) The ratchet 691 has marked on it graduations indicating the proper adjustment for different sizes \* \* \* for different groups of sizes such as men's, women's or children's sizes, moves the back stop 69 to adjust fore and aft the heel band 58 against the tension of the adjustable resilient heel band supporting cords 50 adjusted at 56. (p. 4, ll. 1-116.)

## Second McFeely, No. 1,558,737 Predetermined Adjustment of the Wipers. (R. Vol. II, p. 2.)

(1) The same primary adjustment is effected but by a single mechanism such as a handle 270. The tackers are bolted to the wipers and are adjusted with the wipers. The wipers and tackers move relative to one another by reason of the spring 236 and pin 244 (Figure 7).

## Adjustment of Wipers to Different Sizes of Shoes.

(2) The adjustments of heel band, wipers, tackers and height of shoe are for the purpose of conforming the mechanism to different shapes and sizes of shoes. (p. 2, l. 48; p. 7, ll. 112-116.)

## Adjustment of Heel Band to Different Shoe Sizes.

(3) The adjustment is by the red handle 92 in ratchet 94 operating pinion 88 and pusher 66 attached by clip 62 as in prior art patents to Brock No. 1,188,616, Keyes No. 1,023,854 and Plant No. 958,280. This adjusts the fore and aft position of the heel band 60, as in the first McFeely patent. The sides of the heel band are slidably supported on the clip 74 just as in the first McFeely patent they are supported on the cords which yield fore and aft motion or as in the prior art patents to Brock No. 1,188,616, Keyes No. 1,023,854 and Plant No. 958,280.

## First McFeely, No. 1,129,881 Vertical Hold-Down Adjust- ment.

(4) The vertical position of the shoe as held by the blue hold-down 102 is adjusted by positioning the cam wedge 100 through the adjusting screw 104.

## Wiper and Tacker Movement.

(5) The tackers are mounted upon the wipers and move with the wipers, being arranged to tack on the inside of the wipers after the final wiping operation and the wipers are slidably withdrawn. The tackers do not tack through the wipers.

## Second McFeely, No. 1,558,737 Vertical Hold-Down Adjust- ment. (R. Vol. II, p. 2.)

(4) The vertical position of the shoe mounted on the last upon the yellow jack pin 148 is regulated by the adjustment of the blue hold-down member 200 which is actuated by the pinion 210 through a pinion 214 and rack 216 (Figures 2 and 9) from the master cam 116 as in the first McFeely. The adjustment is effected through the set screw on the rod 222 in member 208. The equivalent adjustment of the vertical position of the hold-down in the first McFeely was the cam 100 and adjusting screw 104. The adjustment of the hold-down is necessary to a much greater extent in the second McFeely because of the upwiping operation in which the vertical position of the shoe is controlled by the hold-down as an essential element. (p. 11, ll. 11-33.)

## Wiper and Tacker Movement.

(5) The second McFeely follows the same principle of construction of the first McFeely; it attaches its tackers to the wipers to tack to one side on the inside of the wipers and provides means (Fig. 7) for adjusting the relative movement between the tackers and wipers to maintain them in predetermined relation to the wiper blades in all positions of adjustment. In this manner there can be this predetermined relationship brought about by the movement of the tackers and the wipers together with relative movement between tackers and wipers just before the tacking operation to withdraw the wipers to permit tacking.



the same manner and in both cases have bolted to them to move with them (brown) tackers which tack on the inside of the (green) wipers. (Appendix A.)

In the first McFeely patent the predetermined adjustment of the wipers to take care of different sizes and shapes of shoes is effected through the adjusting spring and pin 88 and 87 while the finger 122 on the tacker halts the tacker in tacking position so that there is relative movement between the tacker and the wiper. The same function is performed (Figure 2) in the second McFeely where the spring 236 permits relative movement between the tacker and the wiper. This permits the tackers to clear the wipers in order to tack. Likewise, there is primary adjustment of the relative position of the wipers prior to wiping by a single handle 270 (Figure 1). This was perhaps more convenient than the multiple adjustments 87 and 88 in the earlier patent, but certainly not invention. Even if more effective, there was no difference in principle which would justify an extension of a monopoly another seventeen years.

#### **ADJUSTMENTS COMPARED.**

Now let us compare the two McFeely patents on the question of whether these adjustments were found in the first patent as well as in the second. It would seem immaterial whether the adjustments were better in one than in the other, because the claims of the second McFeely cover the adjustments broadly where mentioned as elements in the combination.\*

##### **First Adjustment: Heel Band.**

As to the first means for adjusting the in and out position of the heel band, see the red (Appendix A) lever with an adjusting screw or ratchet in Figure 1 of both McFeely patents. The movement of this lever moving the heel band

\* The chart opposite this page gives a summary comparison.

in and out is to adjust for different sizes of shoes. The first McFeely patent says:

"In Fig. 18 the back stop is shown as formed on a rack bar adjustable by a shaft 690 having a handle at the side of the machine with a pawl in it to engage a locking ratchet 691 having marked on it graduations indicating the **proper adjustment for different sizes. The ratchet can be adjusted to position the graduations for different groups of sizes such as men's, women's or children's sizes.**" (p. 4, ll. 79-88, R. 286, Vol. II.)

"The independently yielding connections also facilitate the adaptation of the wipers to the shape and position of right and left shoes which differ greatly when made on crooked lasts." (p. 5, ll. 107-111, R. 287, Vol. II.)

Adjustments for different sizes of shoes are claimed in the first McFeely patent in claims 1, 81, 99, and 100, and such typical claims as 167 and 168. (R. Vol. II, p. 302.)

Contrast these various statements in the specification as to the adjustments for different sizes of shoes and the claims for such mechanisms, mentioning the purpose of such adjustments, with the opinions below that the first McFeely patent was incapable of operating successfully upon a full range of shoe sizes because it lacked adjustments for that purpose, and particularly compare the vertical section of Figures 2 (see colored chart, Appendix A), of both patents. In both, the back support is adjustable and engages the back of the heel band (orange) in order to push it or slide it. In the first case, the heel band is supported on the cords 50 and in the second case, the heel band is supported on its sides also slidably by the clips 74. **The adjustment of a slidable heel band** supported on its sides and moved back and forth by an adjustable back stop was old and common practice in a number of prior patents, such as Plant No. 958,280 (see Figures 21 and 23), Keyes No. 1,023,854 (see Figure 10), Brock No. 1,188,617 (Figures 1 and 2), etc. Furthermore, the first McFeely patent provides an additional adjustment of the heel band inwardly

and outwardly through the agency of the cords 50, which is described as follows:

“\* \* \* The end portions of the cords are bent outwardly over the swiveled heads 51 of blocks 52, pivoted upon the front arms of angle levers 54, and are attached to separate springs 55 which are independently adjustable by threaded anchors 56. A lining 58 of leather, rubber, felt or other suitable material is arranged within the bands 50 and distributes the pressure of the bands without interfering with their relative conforming movement to adapt them to the contour of each last when they are put under tension by the actuation of the levers 54.” (p. 4, ll. 7-19.)

When the shoe is forced into the heel band against these resilient cords, the adjusting nuts 56 adjust the tension on the band and cooperate in sliding the band. Thus we have not only the same identical adjustment of the heel band in both McFeely patents, but the additional adjustment of the band supporting cords.

The in and out position of the heel band is adjusted in Pym No. 1,368,968 by the adjustable backing member 81 connected to the back of the heel band, and the same thing is true of the aforementioned patents. A clear example is that of Plant No. 958,280 with the identical construction of the clip 188 on the back of the heel band 181 actuated by the pinion 199 through the back adjusting member 198. In this case the physical form of the adjusting mechanism and means of attachment to the back of the heel band is identical with that of the McFeely patent in suit.

#### **Second Adjustment: Wipers.**

The adjustment means (green) is means for predetermined adjustment of the wipers to initially position them for different sizes of shoes to limit the movement of the wipers (and tackers also) inwardly to a predetermined point to fit various sizes of shoes. This is old in such patents as Pym No. 1,368,968, Copeland No. 244,714, Lombard No. 524,445, Eaton No. 596,323, Brock No. 601,935 and



Snow No. 946,708. The first McFeely uses the springs 88 and plunger 87 adjusted by a screw nut (Figures 1, 2 and 8 of the first McFeely patent) for engaging with the cam surface 86 so as to adjust the extent of the inward movement of the wipers according to the size of the shoe. The second McFeely patent uses the handle 268 for the same purpose.

The purpose of the predetermined adjustment of the wipers is to limit the extent of movement of the wiper so that it will complete its stroke into a predetermined position over the last bottom to wipe the upper in position to be tacked, i.e., **the wipers will only go so far inwardly.** As the tackers and wipers in the first McFeely patent are connected together, the adjustment of the wipers likewise adjusts the tackers. **The precise mechanism for doing the same thing is found in the Pym patent,** as shown in Figure 9 of the second McFeely patent and Figure 4 of the Pym patent. In first McFeely the feelers 122 act as "gages" to limit the inward movement of the tackers in cooperation with the predetermined manual adjustment means 88, 87, Figs. 8 and 13. (p. 6, ll. 55-65.) In second McFeely this same result is accomplished by moving the lever 270 (Figures 1 and 3) which determines by its position how far the wiper plates can go before the stop. The first McFeely patent uses a springpressed plunger 87 adjustably positioned for manual predetermined adjustment by the nut 88. The plunger 87, as will be seen in Figure 8 in the attached illustration, engages with a sloping cam 86 so that if the wiper 70 travels too far, the resistance of the springpressed plunger 87 will be overcome and the cam will trip, ceasing further movement of the wiper, because the means pulling it is disconnected. This is described in the first McFeely patent. (pp. 4-5, ll. 116-130; 1-24.)

The wipers are further adjusted in the first McFeely patent **to different sizes and shapes of shoes** by reason of the independently yielding connections to close the side



wipers and the corner wipers through the movement transmitted by the angle levers 90. The feature of predetermining the adjustment of wipers for different sizes, rights and lefts, etc., is a common one in bed lasters, as admitted by plaintiff's own witnesses. (R. Vol. I, pp. 46, 63, 64.) Such patents as Eaton, 596,323; Plant 958,280; Lombard, 524,445; Brock, 601,935; and Snow, 946,708, have predetermined adjustment for the wipers.

### **Third Adjustment: Vertical Movement of Hold-Down.**

The third adjustment is the manually adjustable means for adjusting the amount of vertical movement of the blue hold-down which determines the vertical position of the shoe and last. In the first McFeely patent this hold-down (Fig. 2) 102, is moved by the same rack and pinion construction as the second McFeely patent. These racks and pinions are moved through the horizontal rods engaging with the power cam surfaces. In the first McFeely patent an adjusting cam 100 is adjusted inwardly and outwardly to determine the height of the shoe by the set screw 104.

This same adjustment is in the second McFeely patent where the adjusting screw and nut engage the member 208 (Fig. 9). Bed lasters also have the same adjustments as the patents in suit; see Keyes No. 1,023,854 which has an adjustable hold-down 66, as does Pym No. 1,368,968, using the adjusting screws 74 and 75 adjusting the vertical position of the hold-down 72.

## **ARGUMENT.**

### **POINT I. EXTENSION OF EXPIRED MONOPOLY.**

The McFeely patents are substantially identical, except for three substituted adjustments, themselves old in this art: the second McFeely patent in suit No. 1,558,737 has simply repatented an old combination set forth and claimed in the first McFeely patent No. 1,129,881 as well as other patents of respondent.

The two McFeely patents, the expired patent No. 1,129,881 and the McFeely patent in suit No. 1,558,737, as will be seen from an examination of their drawings and specifications, are **substantially identical in construction, operation and result.**

**The Nature of Heel Seat Lasting: Accommodation of Different Sizes Inherent in Such Machines.**

Heel seat lasting is the operation of wiping the margins of the leather adjacent the bottom of the heel over the bottom of the heel to draw the leather taut and close about the heel. The leather so turned over on the bottom of the heel is tacked into position on the heel bottom. Thereafter, the heel itself is mounted on the heel portion of the inverted shoe.

In practice, it has been traditional for many years, and still is, to place a wooden last inside of the shoe that is being made with the bottom of the shoe up. The leather constituting the body of the shoe has its bottom edges projecting upwardly around the heel portion of the shoe and the heel portion of the last. This upwardly extending margin of leather about the heel of the last and the shoe, is then turned over by wiper plates moving across the bottom of the heel to bend the leather over into a horizontal position. Thereupon, the leather is tacked in its horizontal position to the bottom of the shoe. This tacked portion is ultimately covered by the heel itself which is mounted on the bottom of the shoe. (R. Vol. I, pp. 65-68.) To further explain this to the Court, let us refer to the basic Copeland patent No. 244,714 (Ex. J, R. Vol. II, p. 114) issued sixty years ago. All of the mechanism and movements for heel seat lasting in a power machine with automatic tacking are found in this early patent. Since then the art has been devoted to the perfection of mechanical details. It was the first machine for automatically performing the combined operations of heel seat lasting by wiping the leather of the heel or toe across the bottom of the last, while tacks were

inserted to hold the leather in position on the bottom of the sole over which the leather had been wiped. Copeland mounted his brown tackers on the green wipers so that they would move together and the tackers tacked through holes in the wipers. He says:

“This invention relates more especially to devices for lasting the toe and heel portions of boots and shoes, and it embraces, first, *means for holding the upper to the side of the last*, about the toe or heel, prior to the folding of the edge thereof upon the surface of the insole; second, *folding-plates*, or devices for folding the edge of the upper upon the insole, and a gang or *group of devices for driving fastenings simultaneously* or by a single impulse after the folding-plates have performed their functions, and which may or may not be placed in position to be operated by them; \* \* \*.” (p. 1, ll. 19-31.)

Copeland used the adjustable wiper actuators C<sup>1</sup> to move the wipers and tackers into operating position across the bottom of the shoe. (Defs. Ex. J.) **Thus it was possible for Copeland to predeterminately adjust, before the movement of closing the wipers, the relative position of the wipers with respect to the shoe to accommodate different sizes and rights and lefts.** He says:

“The heel-lasting devices, being secured at the end of the sliding plate C, are by the movement of the toe-lasting plates inwardly caused to assume, automatically, the proper position which the apparatus should bear at the commencement of the lasting—that is, the upper-holding devices are thrown forward and the folding-plates are opened.” (p. 2, ll. 102-109.)

A yielding positioning heel clamp b was mounted on the adjustable end of the shoe support b<sup>1</sup> so as to adjust the pressure on the end of the shoe to hold it in suitable position. This machine was either driven “in connection with a treadle when operated by foot-power, and a cam lever when operated by motive power, for reciprocating said blocks” (p. 2, ll. 30-33); “but we may use, in combination with the



folding-plates, any arrangement of devices for driving fastenings of any description desirable, \* \* \*. The advantages of this invention are that the toe and heel, or either, **can be lasted much more rapidly** than by the ordinary toe and heel lasting mechanism." (p. 2, ll. 120-132; p. 3, ll. 1-6.)

Here we have a power-operated production machine for performing the heel seat lasting operation which is *adjustable to different sizes of shoes* due to the adjustment of the support C and the spring fingers b as well as the relatively adjustable actuating clamps C<sup>1</sup> that move the wipers and tackers; and the broad combination was so claimed.<sup>1</sup>

It, of course, is obvious that **any machine for heel seat lasting must be adjustable to different sizes of shoes and rights and lefts, or it would be of little value**, and the Copeland construction, as well as all subsequent patents in this record, recognized such a requirement by proposing an infinite variety of engineering mechanisms for accommodating heel seat lasting machines to this inevitable condition in shoe making. Respondent's position is that it was not until the second McFeely patent that such a construction was disclosed which would so fully accommodate itself. How unsound this position is, is best demonstrated by a brief review of the facts as shown by the prior patents. Different sizes of shoes and rights or lefts require adjustments for the height of the shoe and adjustments of the position of the wiper plates so that they will start to wipe from the right position. This requires hold-down adjustments for the lasts determining the vertical position, and adjustments for the wipers determining the start of the

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<sup>1</sup> "4. In a machine for lasting the uppers of boots and shoes, the combination of the last, a jack for supporting it, the toe or heel folding plates, and a gang or group of fastening driving devices supported and adapted to be positioned by the movement of the lasting plates, all substantially as and for the purposes described." (Copeland, 244, 714.)



wiping operation. For instance, Lombard, No. 524,445 (Ex. K, R. Vol. II, p. 128) says:

"One of the most important and characteristic features in my present invention comprises **mechanism for automatically adjusting the position of the wipers to the varying contours** of the heels of boots or shoes; \* \* \*." (p. 1, ll. 40-44.)

"\* \* \* Consequently the wipers are contracted to (a greater extent and are thus adapted to fit a small heel, conversely with a larger heel. Since the position of the bolt is changed **for different sizes of shoes**, it is evident that the wipers are automatically adjusted for each and every size." (p. 1, ll. 80-86.)

And Eaton, No. 596,323 (Exs. L and M, R. Vol. II, p. 138) so claimed the Copeland combination with these wiper adjusting means.

"1. In a lasting-machine, a toe or heel lasting mechanism comprising a base or support, a carrier movable thereon, devices for moving the carrier, wipers pivotally connected with the carrier, mechanism operated by movements of the carrier for giving the wipers an accelerated motion, **and wiper-adjusting devices co-operating with said mechanism**, said devices being independent of the carrier-moving devices."

Eaton consists of a heel band clamp supported at the outer ends by the supports and pressed at the back by similar supports. The wipers B<sup>8</sup> are adjusted with respect to one another predefinitely by the end wheel 27 to the rack 24 and pinion 21, and thereafter the wipers are moved forwardly by the handle B<sup>9</sup>. The patentee provides "**means for adjusting the wipers toward and from each other before giving them the combined forward and inward movement which wipes the upper over the last.**" (p. 1, ll. 98-102.)

And Brock, No. 601,935, taught his way of adjusting the wipers for different sizes and shapes, saying:

"The principal object of my invention is the production of a lasting-machine wherein the lasting devices,

whether in the form of wiper plates or otherwise and whether located at the heel, toe, or elsewhere, may be **predeterminately positioned** at the same distance from the outside of the last **whatever be the shape, size, or width of the last.** While it is not essential that this positioning mechanism be automatic in its action, yet I prefer that it be automatic, and in the subsequent specification and in the drawings I shall illustrate my invention in connection with an automatic mechanism." (p. 1, ll. 68-81.)

This was a predetermined adjustment in advance of the lasting operation.

And respondent's expired Pym Patent No. 1,368,968 (R. Vol. II, p. 457), which was originally in this suit and abandoned by it just before trial because of its expiration, not only discloses the predetermined adjustment of the wipers (p. 2, ll. 3-10, Pym patent, R. Vol. II, p. 487) but claims the predetermined adjustment.<sup>1</sup>

So much for the teachings on the predetermined adjustment of the wipers of which there are numerous other examples.

The adjustment of the heel band in and out which clamps the heel of the shoe and holds it during wiping is also an old expedient in lasting machines.

Respondent's own (Keyes, No. 1,023,854 [Fig. 10] R. Vol. II, p. 238, or Brock, No. 1,188,616 [Figs. 9 and 10] R. Vol. II, p. 388) show heel band and heel band supports attached to one another for the in and out adjustment, substantially identical with that of the second McFeely patent

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<sup>1</sup> "168. In a machine of the class described, the combination with shoe positioning means, of end embracing wipers, a wiper support movable to carry the wipers lengthwise of the shoe, and means operated by said movement of the wiper support for closing the wipers inward laterally of the shoe during their movement lengthwise of the shoe comprising parts movable with said support and cooperating parts normally held against movement with the support, **said last named parts being adjustable relatively to said support to determine the initial positions of the wipers.**"

in suit. The alleged new feature of having the heel band slidable fore and aft to accommodate different sizes of shoes with the heel band permanently attached to the mechanism to push it and pull it, is fully disclosed in these patents. The patentee Brock saying:

"The heel band through its chain 86, Fig. 10, is attached at its rear closed end to a block 88 which is dovetailed upon a head 89 for sliding adjustment transversely of the machine. The block 88 has a lateral arm pivotally connected to the front end of a lever 90 of the third class that is fulcrumed at 91 and has threaded engagement with an adjusting rod 92 carrying a hand wheel 94. The head 89 has threaded engagement with a rod 95 having a hand wheel 96 **by which the band can be adjusted lengthwise**, both adjustments being independent of the wipers." (p. 4, ll. 16-28, R. Vol. II, p. 394.)

The third adjustment of the height of the last and shoe, known as the adjustable hold-down, is likewise old, because a very necessary adjustment due to different sizes of shoes, would require different vertical positions of the last to insure that the wipers will miss the bottom of the shoe but come close enough to it to neatly fold over the leather side walls of the shoe on the bottom of the last prior to tacking. The hold-down keeps the shoe upon the supporting jack and the adjustment of the hold-down determines the elevation of the shoe as the hold-down presses the shoe and last against the supporting jack spring that yieldingly supports the shoe.

In respondent's Pym patent, formerly in suit and now expired, such an adjustment was effected by the screw and nut or sleeve, 74-77. Pym said:

**"Obviously the holddown may be adjusted vertically by turning sleeve 74."** (Pym patent, p. 6, ll. 67-69, R. Vol. II, p. 462.)

Other prior patents, including the first McFeely, elsewhere discussed, show these three adjustments as conven-



tional and necessary to fit lasting machines to different sizes of shoes. (R. Vol. II, p. 266.) The second McFeely patent says:

"This invention relates to lasting machines for use in the manufacture of boots and shoes, and is herein illustrated in its application to a machine for lasting the heel ends, or the heel seats, of shoes, **the drawings showing a machine of the same general type as that illustrated in United States Letters Patent No. 1,129,881 granted upon my application on March 2, 1915, in which type of machine it is one of the objects of the invention to effect improvements.**" (p. 1, ll. 12-22.)

The tack mechanism is the same, p. 3, ll. 84-92; p. 9, ll. 7, etc.; the operating mechanism and sequences, p. 12, ll. 22, etc. The only differences claimed by respondent are the improvements in adjustments in the second McFeely patent to the first McFeely patent to make (a) the wipers or tackers; (b) the heel band; and (c) the hold-down adjustable so as to give the second McFeely patent greater flexibility in lasting a greater variety of sizes of shoes. (R. Vol. I, p. 481, Finding 29; C. C. A. opinion 511.)

The District Court, whose findings were affirmed by the Circuit Court of Appeals, held:

"\* \* \* that while the McFeely patent in suit No. 1,558,737 embraces many elements of the McFeely patent No. 1,129,881, the earlier McFeely patent lacked, so far as it relates to Claims 6 and 85, certain elements which prevented it from being commercially successful; that is to say, among others, it would not permit of a successful operation upon a range of shoe sizes; the operation of the tackers and wipers could not be controlled with accuracy, or in other words, adjusted as are the tackers and wipers in the machine covered by the patent in suit; and also, immediately before the tacking movement the wipers would be retracted partly to permit of the tacking and in so doing have a tendency to pull the upper from the insole, which would tend in some instances to and in many operations did make



an imperfect job, if not damage the shoe." (R. Vol. I, p. 483.)

The additions comprised, therefore, these three improved substituted adjustments to make the second McFeely a more commercial machine to work on a broader range of shoe sizes. If they were novel, they should have been patented *per se*. The additions themselves, as hereinafter pointed out, were old in this art, used in similar combinations for heel seat lasting, and were substitutions within the skill of the art open to the public and no longer susceptible to monopoly exclusively by this respondent, whose patents thereon had expired. (R. Vol. II, pp. 280, 440.)

McFeely did not stop with patenting these adjustable features themselves, but included the old features of the first McFeely patent which expired in 1932. McFeely, in his present claims, clearly failed to point out what he invented, if anything, but commingled his alleged improvements with an old heel seat lasting machine which was public property. This is contrary to R. S. 4888,\* U. S. C. Title 35, Sec. 33, which requires the applicant to particularly point out and distinctly claim the part claimed as his invention.

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\* "Before any inventor or discoverer shall receive a patent for his invention or discovery he shall make application therefor, in writing to the Commissioner of Patents, and shall file in the Patent Office a written description of the same, and of the manner and process of making, constructing, compounding, and using it, in such full, clear, concise, and exact terms as to enable any person skilled in the art or science to which it appertains, or with which it is most nearly connected, to make, construct, compound, and use the same; and in case of a machine, he shall explain the principle thereof, and the best mode in which he has contemplated applying that principle, so as to distinguish it from other inventions; and he shall particularly point out and distinctly claim the part, improvement, or combination which he claims as his invention or discovery. The specification and claim shall be signed by the inventor. No plant patent shall be declared invalid on the ground of noncompliance with this section if the description is made as complete as is reasonably possible."

A patentee cannot, by improving elements of an old combination, whose construction and operation is otherwise unchanged except as modified or improved by the adjustments, in effect repatent the old combination for another seventeen years by reclaiming it with the improved elements substituted for the old elements. *Bassick v. Hollingshead*, 298 U. S. 415 and *Lincoln v. Stewart Warner Corp.*, 303 U. S. 545.

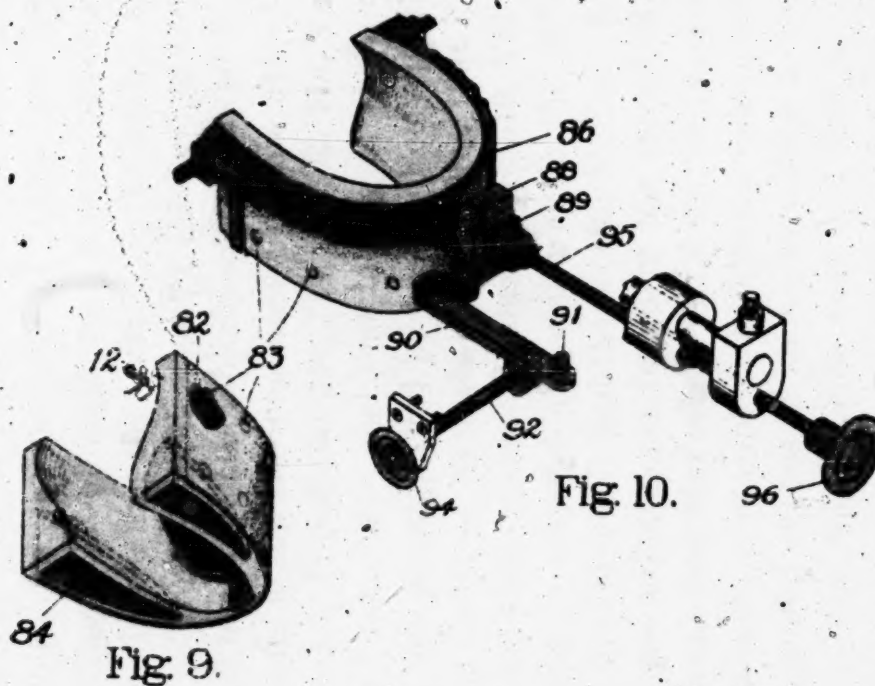
The McFeely patents relate to an automatic heel seat lasting machine for the purpose of "heel seat lasting" i.e., the turning over of leather of a shoe upper on the bottom of the insole and the tacking of the leather against such insole before the application of the heel to the shoe. Heel seat lasting is an accomplishment practiced by automatic and semi-automatic machinery in this art of more than sixty years. (Copeland 244, 714, etc., R. 114, Vol. II.) The result of automatic heel seat lasting of shoes of different sizes was accomplished by first McFeely patent No. 1,129,881, the Court of Appeals below finding that it "successfully lasted shoes of specific sizes." (R. 510, Vol. I.)

According to respondent's claim as to the difference between the first McFeely and the second McFeely patents, **there are three adjustments found in the second McFeely not found in the first McFeely.** The result of these adjustments was to make it possible to handle a greater number of different sizes and shapes of shoes, according to respondent's claim. These adjustments were first that of the heel band by which it was connected positively for fore and aft movement to fit different lengths of shoes. This two-way, in and out adjustment *per se* in the second patent, was substituted for adjustable rubber band supports that moved the heel band in one direction only while the back pusher moved it in the other direction in the first McFeely patent. (Opinion of Circuit Court of Appeals, R. Vol. I, p. 511.) The two-way adjustment of a heel band through a fixed connection between the band and pusher in the second Mc-

1,188,616.

M. BROCK.  
LASTING MACHINE.  
APPLICATION FILED JUNE 29, 1912.

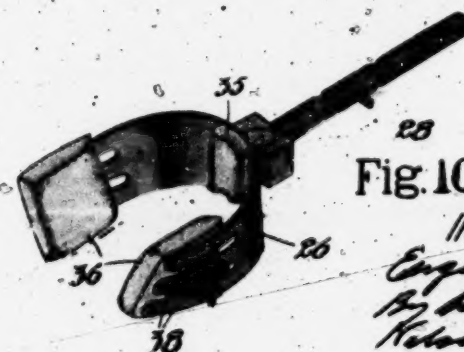
Patented June 27, 1916.  
4 SHEETS—SHEET 3.



1,023,854.

E. L. KEYES.  
MACHINE FOR USE IN THE MANUFACTURE OF SHOES.  
APPLICATION FILED APR. 30, 1908.

Patented Apr. 23, 1912.  
SHEET—SHEET 4



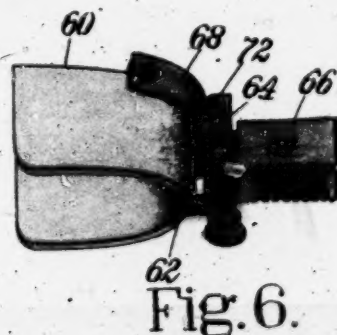
INVENTOR.  
*Engine L. Keyes*  
*By his Attorney,*  
*Robert M. Howard.*

Oct. 27, 1925.

R. F. McFEELY  
LASTING MACHINE

1,558,737

Original Filed Aug. 16, 1916 6 Sheets—Sheet 1





Feely was an old feature in the art as shown in the patent to Copeland, No. 244,714, Figure 3; Lombard, No. 542,445, Figure 5; Eaton, No. 596,323, Figure 3; Brock No. 601,935, Figure 8; Plant, No. 958,280, Figure 5; Brock, No. 1,188,616, Figures 9 and 10; Pym, No. 1,368,968, Figures 12 and 13, and Keyes, No. 1,023,854, Figure 10. (R. Vol. II, pp. 114, 122, 136, 150, 222, 238, 388, 440, 454.)

The second adjustment in the second McFeely was a predetermined one for the wipers to initially position them to accommodate different sizes of shoes. (Opinion of Circuit Court of Appeals, R. Vol. I, p. 511.) This also was an adjustment common in this art in such patents as Pym, No. 1,368,968, Figure 6; Copeland, No. 244,714, Figure 2; Eaton, No. 596,323, Figure 3; Brock, No. 1,188,616, Figure 2, and Snow, No. 946,708, Figure 2. (R. Vol. II, pp. 440, 446, 427, 136, 384, 172.)

The third adjustment (opinion of Circuit Court of Appeals, R. Vol. I, p. 511), was the vertical movement of the hold-down, which also was, *per se*, old in respondent's expired Pym patent No. 1,368,968, Figure 8, formerly in this suit, and Keyes, No. 1,023,854. (R. Vol. II, pp. 232, 444.)

All three of these adjustments were found in the first McFeely patent.

The Court of Appeals below said:

"It is true that many of the features of the claims are old and that an organization, including wipers and tackers, was shown in somewhat primitive form in Copeland. It is also true that adjustability of elements, though not in the form shown in the first McFeely patent, is added by the patent in suit to the McFeely type laster, and that mere adjustability by common mechanical expedients may not, of itself, denote the presence of the quality of invention and merit the issue of a patent." (R. 511, Vol. 1.)

The adjustable features in the second McFeely do not in any way modify the lasting operation. **The adjustments**



are made by hand before the lasting operation starts. (R. Vol. 1, p. 47, A. 3, Ib. 409-10; Ib. 69, A. 17, Ib. 368, XA. 312-315, Ib. 369, XA. 319.) The result of the lasting operation is exactly the same as in the first expired McFeely patent and in other prior art patents. (R. 15, Vol. 2, lines 19-23, p. 3, patent 1,558,737; Rec. 129, Vol. 2, XA. 1-15; Ib. 298-9; Ib. 300-5; Ib. 314-16; Ib. 318-321; Ib. 362-3, XA. 263-274; Ib. 394-5; Ib. 420.)

Petitioner's position is that the claims of the second McFeely patent go to the old combination, which is expired, and include these adjustments as a part of the old combination in substitution for other adjusting mechanism in the first McFeely patent, thereby **in effect repatenting the old combination by reclaiming it with the improved elements substituted for the old elements**, as for instance, substituting the two-way adjusting mechanism for the heel band in the first McFeely patent for its heel band with the rubber cord supports not positively connected to the back pusher.

The evil of the system of granting and sustaining patents for a repatented combination from which there has been removed a more or less uneconomical element and substituting an old element which is more effective, permits an endless extension of monopoly, and a permutation of the possible combinations so that the patents secured are endless in number and never restricted in scope. Respondent in the case of the Hoyt patent in suit was held guilty of such extension of monopoly by the Circuit Court of Appeals herein. (R. 512-13, Vol. 1.) This practice enables an energetic Patent Department of a great corporation like that of respondent, through the sheer mass of such patents so secured by repatenting old monopolies, to make it impossible for any manufacturer of shoes to do other than to comply with its demands by rental of its machines and thereby pay tribute to such patents **without end to the tribute.**

In *Bassick v. Hollingshead*, 298 U. S. 415, this Court held that an old combination could not be repatented by improving one or more of the old elements. This Court said:

"It is plain that Gullborg invented improvements of two of the mechanical elements of an old combination consisting of grease pump, hose, hose-coupler, and a grease cup or pin fitting. First, he contrived an improved pin fitting. This he patented as such (No. 1,307,733.) Secondly, he invented an improved form of coupler to be attached to the end of the hose leading from the pump to the fitting. Instead of patenting this, as he did the pin fitting, he claimed a combination of pump, hose-coupler, and pin fitting, and embodied in the combination his improved form of coupler. (No. 1,307,734, the patent in suit; claims 1-6, 8 and 10.) He further claimed the combination between his patented pin fitting and any form of grease gun whether that claimed in his patent or unpatented and old in the art. (Claims 14 and 15.) **The question then is whether, by this method, the patentee, by improving one element of an old combination whose construction and operation is otherwise unchanged, may, in effect, repatent the old combination by reclaiming it with the improved element substituted for the old element. That this cannot be done is shown by numerous cases in this and other federal courts.**" (pp. 424-425.)

The Court of Appeals was reversed.

In *Lincoln v. Stewart Warner*, 303 U. S. 545, this Court also held the patent invalid because the improvement was in one part of an old combination.

"\* \* \* The invention, if any, which Butler made was an improvement in what he styles in his specifications the 'chuck' and in his claim a 'coupling member.' It is not denied that multi-jawed chucks had been used in industry and as couplers in lubricating apparatus. Butler may have devised a patentable improvement in such a chuck in the respect that the multiple jaws in his device are closed over the nipple by the pressure of the grease; but we think he did no more than this. **As we said of Gullborg in the Rogers case, having hit**

upon this improvement he did not patent it as such but attempted to claim it in combination with other old elements which performed no new function in his claimed combination. The patent is therefore void as claiming more than the applicant invented. The mere aggregation of a number of old parts or elements which, in the aggregation, perform or produce no new or different function or operation than that theretofore performed or produced by them, is not patentable invention. And the improvement of one part of an old combination gives no right to claim that improvement in combination with other old parts which perform no new function in the combination." (pp. 549, 550.)

The Court further said:

"\* \* \* The function of a pump has always been to force a fluid or a grease through a conduit. The fact that this function of the pump is utilized in Butler's improved form of coupler not only to convey the lubricant to the bearing but to operate the jaws of the chuck does not alter the function of the pump. The invention, if any, lies in the improvement in the coupling device alone." (p. 551.)

"We conclude that Butler's effort, by the use of a combination claim, to extend the monopoly of his invention of an improved form of chuck or coupler to old parts or elements having no new function when operated in connection with the coupler renders the claim void." (p. 552.)

The heel seat laster in the second McFeely patent operates exactly the same as the heel seat laster in the first McFeely patent. The addition of the adjustable features, taken from the old art, does not in any way affect the old heel seat lasting mechanism of the first McFeely patent. The result obtained by both is the same. The adjustments are made solely for the purpose of accommodating different sizes of shoes and are used only when a different size shoe is to be lasted. McFeely's effort in his second patent, by the use of a combination claim, to extend the monopoly of his invention of an improved form of ad-



justment (taken from the prior art) to old parts or elements (the first McFeely patent) having no new function when operated in connection with the coupler renders the claims void. The Court of Appeals erred in not recognizing that the facts in the present case are exactly the same as in the "*Bassick*" and the "*Lincoln*" cases, *supra*; and in not holding the claims invalid because they cover an old combination with adjustments added which do not operate when the heel seat lasting operation is effected, and which operate only when the size of the shoes is to be changed and before any different sized shoe is lasted.

It misapplied the principles laid down by this Court as evidenced by the following statement from its opinion (R. Vol. I, p. 511):

"There is here much more than mere improvement in quality or quantity of product due to the independent functioning of an improved element, as in *Bassick v. Hollingshead*, 298 U. S. 415, or *Kodel Elec. Co. v. Warren Clock Co.*, 62 F. (2d) 692 (C. C. A. 6)."

But what this "much more" feature or function was, was not stated by the Court. It does not, of course, exist.

We submit that the doctrine against repatenting an old combination by substituting old elements or even adding old elements, is not limited to the conditions just specified in the above quotation. Whatever improvement was made by McFeely should have been covered specifically, and claims to more than that, including public property, are invalid.

This Court's decision prohibits remonopolizing that which has already been dedicated to the public by expiration of a prior patent, whether the latter effort to repatent involves a matter of substitution of elements or additions thereto, or improvement. To so limit the doctrine of the *Bassick* and *Lincoln* cases, as did the Court of Appeals below, would make them substantially ineffective to prevent the abuses from extension of monopoly in most cases.



**Adjustments to Give Greater Flexibility and Range of Sizes:  
Not Invention.**

The claimed difference between the first McFeely and the second was the ability of the latter, by reason of the improved adjustments, to produce greater range of shoe sizes. The Court below said:

“Although the machine (first McFeely patent) successfully lasted shoes of specific sizes, it proved incapable of operating upon a range of sizes large enough to adapt it for commercial operation in the ordinary shoe factory \* \* \*.” (R. Vol. I, p. 510.)

Improved adjustments are claimed by respondent as the reason for the McFeely patent in suit being capable of operating on a full range of sizes. But adjustability is not invention. To improve a thing by making it easier to adjust, or to work, or to vary operating conditions or adapt it to a greater range of sizes, is not invention. The adjustment of an existing machine making it more convenient or accurate is rather within the skill of the artisan than within the genius of the inventor. At best, all the inventor can hope for is to patent the particular adjustment as a separate entity, if it meets the tests of invention.

In the case of *Smith v. Magic City*, 282 U. S. 784, 51 S. Ct. 291; 75 L. Ed. 707, Mr. Chief Justice Hughes said:

“\* \* \* and we are also of the opinion, as was the Circuit Court of Appeals for the Sixth Circuit (*Smith v. Springdale Amusement Park, supra*), that supplying the feature of the truss rods and the adjustable stay rods did not constitute invention. To provide such supports would be but a step obvious to any skilled mechanic.” (p. 792.)

*Directoplate Corp. v. Donaldson Lithograph Co.*, 51 F. (2d) 199 (C. C. A. 6); *Paquette et al. v. Potter Mfg. Co.*, 46 F. (2d) 271 (C. C. A. 6); *Smyth Mfg. Co. v. Sheridan, et al.*, 149 F. 208 (C. C. A. 2); *Wailes Dove-Hermiston Corp. v. Oklahoma Contracting Co.*, 48 F. (2d) 901 (D. C. N. D.

Tex.), affirmed in 56 F. (2d) 143 (C. C. A. 5); *Sipp Electric & Machine Co. v. Atwood-Morrison Co.*, 142 F. 149 (C. C. A. 3); *American Graphophone Co. v. Gimbel Bros.*, 240 F. 971 (C. C. A. 2); *Houser et al. v. Starr*, 203 F. 264 (C. C. A. 6).

The mere carrying forward of the old idea of an adjustable heel seat lasting machine, no matter how much improved such a machine might be, was an engineering accomplishment open to any manufacturer. All that McFeely did in his last patent was as to his first patent "a mere carrying forward of new or more extended application of the original thought, a change only in form, proportions or degree, doing substantially the same thing in the same way, by substantially the same means, with better results." As Mr. Chief Justice Waite observed in 91 U. S. 150, 23 L. Ed. 267:

"This is not such an invention as will sustain a patent."

*Wright v. Yuengling*, 155 U. S. 47, 15 S. Ct. 1, 39 L. Ed. 64; *Belding v. Challenge Corn Planter*, 152 U. S. 100, 14 S. Ct. 492, 38 L. Ed. 370; *Railroad v. Elyria*, 244 U. S. 285, 37 S. Ct. 502, 61 L. Ed. 1136.

**Even if Improved Adjustable Means New Per Se: Still No Excuse to Repatent an Old Combination.**

The situation that is presented to this Court in the attempt of the respondent to monopolize by patents what is a natural and ordinary engineering and manufacturing development, is perfectly described by Mr. Justice Bradley in *Atlantic Works v. Brady*, 107 U. S. 192, 2 S. Ct. 225, 27 L. Ed. 438:

"The process of development in manufactures creates a constant demand for new appliances, which the skill of ordinary head-workmen and engineers is generally adequate to devise, and which, indeed, are the natural and proper outgrowth of such development.

Each step forward prepares the way for the next, and each is usually taken by spontaneous trials and attempts in a hundred different places. To grant to a single party a monopoly of every slight advance made, except where the exercise of invention, somewhat above ordinary mechanical or engineering skill, is distinctly shown, is unjust in principle and injurious in its consequences." (pp. 199-200.)

In *Lincoln v. Stewart-Warner*, 303 U. S. 545, the patentee, Butler, improved a couplet, but tried to patent it in combination with the pump. This Court held the claim void, saying:

"The function of a pump has always been to force a fluid or grease through a conduit. The fact that this function of the pump is utilized in Butler's improved form of coupler not only to convey the lubricant to the bearing but to operate the jaws of the chuck does not alter the function of the pump. The invention, if any, lies in the improvement in the coupling device alone." (p. 551.)

At p. 552 this Court said:

"We conclude that Butler's effort, by the use of a combination claim, to extend the monopoly of his invention of an improved form of chuck or coupler to old parts or elements having no new function when operated in connection with the coupler renders the claim void."

McFeely claims here are void because, even if the adjustable means were new *per se*, the attempt to extend the monopoly to cover old parts or elements renders the claims void when such claims seek to reclaim the old general structure by adding adjustments that are new, at least, *per se*. The same rule was announced in *Bassick v. Hollingshead*, 298 U. S. 415, in which this Court said:

"It is plain that Gullborg invented improvements of the two mechanical elements of an old combination consisting of grease pump, hose, hose-coupler, and a grease cup or pin fitting. First, he contrived an im-

proved pin fitting. This he patented as such (No. 1,307,733.) Secondly, he invented an improved form of coupler to be attached to the end of the hose leading from the pump to the fitting. Instead of patenting this, as he did the pin fitting, he claimed a combination of pump, hose-coupler, and pin fitting, and embodied in the combination his improved form of coupler.

\*\*\* The question then is whether, by this method, the patentee, by improving one element of an old combination whose construction and operation is otherwise unchanged, may, in effect, repatent the old combination by reclaiming it with the improved element substituted for the old element. That this cannot be done is shown by numerous cases in this and other federal courts." (pp. 424-425.)

It follows that the McFeely claims, even if there is novelty in the adjustable means *per se*, are void because they include the adjustable means with old parts, making an old combination, which cannot be done.

#### **Substitution of Improved Adjustments Securing an Improved Result is Not Invention.**

Change in proportions of the McFeely adjustments does not constitute invention, because a change in proportions is primarily a matter of mechanical skill or engineering talent. This falls within the domain of design, not of invention, because it is a problem of calculation based upon known engineering data and can be accomplished in the routine application of established principles of design. In the case of *American Road Mach. Co. v. Pennock*, 164 U. S. 26, 17 S. Ct. 1, 41 L. Ed. 337, Mr. Chief Justice Fuller held:

"It appears to us that, it being seen that the tendency to reverse would prove objectionable in the proposed machine, the suggestion that the handwheels should be made heavier in order, by greater momentum, to correct that tendency, as it was well known increase in weight coupled with adequate rotative force would,



sprang naturally from the expected skill of the maker's calling, and that this use of the heavier wheel did not make the mechanism in any proper sense a new thing evolved by the inventive faculty.

"The substitution of the heavier wheel was not the product of a creative mental conception, but merely the result of the exercise of 'the ordinary faculties of reasoning upon the materials supplied by a special knowledge, and the facility of manipulation which results from its habitual and intelligent practice'." (pp. 41-42.)

**Where the Fundamental Organization is Old and Public Property, a Patent which Attempts to Repatent such Organization by Merely Adding Improved Elements or Adjustments is Invalid. The Patentee has Mistaken his Remedy.**

The views of this Court for so many years as consistently expressed in its decisions, as we understand them, are to the effect that mere multiplicity of elements does not make a combination. This was particularly so held in the case of *Richards v. Chase*, 158 U. S. 299. All elements must so enter into the combination so that each qualifies the other. To mount an adjustment upon a machine to get it ready for its main operation is not such a modification. *Pickering v. McCullough*, 104 U. S. 310, 26 L. Ed. 749. The mere increase in speed of manufacture and in greater uniformity of product does not make invention. *Thropp's & Sons Co. v. Seiberling*, 264 U. S. 320. Tested by these well known standards the mere improvement in adjustments in this old combination can scarcely rise to the dignity of invention.

**The patentee's mistake was in patenting an old combination instead of patenting the invention he had made.**

**Merely Securing "An Improved Result" is not Enough to Spell out Invention.**

It is not enough that the functions of a new and useful apparatus give an improved result. The making of better

shoes is a step in that direction, but that is not invention. Many things are novel and have utility which are the natural result of sound engineering and the steady progress of the useful arts by artisans without reaching that limited ground where we find the work of creative genius. This Court has so held in the recent case of *Cuno Engineering v. Automatic Devices*, 62 S. Ct., 37, where this Court said:

"We may concede that the functions performed by Mead's combination were new and useful. But that does not necessarily make the device patentable. Under the statute (35 U. S. C. 31; R. S. 4886) the device must not only be 'new and useful,' it must also be an 'invention' or 'discovery.' *Thompson v. Boisselier*, 114 U. S. 1, 11. Since *Hotchkiss v. Greenwood*, 11 How. 248, 267, decided in 1851, it has been recognized that if an improvement is to obtain the privileged position of a patent more ingenuity must be involved than the work of a mechanic skilled in the art \* \* \* 'Perfection of workmanship, however much it may increase the convenience, extend the use, or diminish expense, is not patentable.' *Reckenderfer v. Faber*, 2 Otto 347, 356-357. \* \* \* That is to say the new device, however useful it may be, must reveal the flash of creative genius, not merely the skill of the calling. If it fails, it has not established its right to a private grant on the public domain." (pp. 40-41.)

All McFeely did was to substitute old adjustable means for other old means and then patent these adjustments as a part of an old combination. What he did was nothing more than the skill of the mechanic—it was not invention. *Essex Razor Blade Corp. v. Gillette Safety Razor Co.*, 299 U. S. 94, 98.

**"Independent Functioning of an Improved Element" no Ground for Remonopolizing Expired Combination.**

When old elements are put together in a new partnership, they must produce something more than mere improvement or new function of the improved elements

added to the old ones. The group must produce something more than merely the sum of the results of the separate parts. That is all the second McFeely accomplished; the adjustments were merely additive. No new result was obtained: perhaps more shoes, the ability to work on more sizes, the production of better shoes resulted—but these things are engineering and manufacturing accomplishments. We again return to the apt statement on this point in *Lincoln v. Stewart-Warner*, 303 U. S. 545, this Court saying:

“We said that if Gullborg had invented anything he had invented an improved pin fitting and an improved coupler and that to allow him to claim either in combination with old elements which performed no new function, would be to permit him to extend the monopoly of his invention to those old and well-known devices.” (p. 548.)

That is the situation in this case. If McFeely invented anything, his invention was in the adjustable features. However, they were old and were not invented by him. But even if new, to allow him to claim them in combination with old elements which performed no new function, would be to permit him to extend the monopoly of his invention to a broad combination previously dedicated to the public.

In *Grinnell v. Johnson*, 247 U. S. 426, this Court cited *Hailes v. Van Wormer*, 20 Wall. 353, 368, from which it quoted:

“But the results of the combination must be a product of the combination, and not a mere aggregate of several results, each the complete product of one of the combined elements.” (p. 432.)

This Court then said:

“No new function is ‘evolved from this combination’; the new result, so far as one is achieved, is only what arises from the well-known operation of each one of the elements.

"In the gearing specified every element is old. The operations of the wringer and the washing machine, although simultaneous, are independent one of the other." (p. 433.)

And again at p. 434:

"Phillips may have produced a more convenient and economical mechanism than others who preceded him, but superiority does not make an aggregation patentable. *Specialty Manufacturing Co. v. Fenton Metallic Manufacturing Co., supra.*"

In *Pickering v. McCullough*, 104 U. S. 310, cited in *Cuno Engineering v. Automatic Devices*, 62 S. Ct., 37, this Court covered the present situation saying:

"In a patentable combination of old elements, all the constituents must so enter into it as that each qualifies every other; to draw an illustration from another branch of the law, they must be joint tenants of the domain of the invention, seized each of every part, **per my et per tout**, and not mere tenants in common, with separate interests and estates." (p. 318.)

McFeely's old elements do not operate simultaneously, but **the adjusting means are set for a given size of shoes before lasting takes place.** Thereafter the machine operates without further adjustment until a new size of shoe is to be worked upon. No further adjustment is made until another size of shoe is to be lasted. If the same size of shoe is to be lasted for a month or for a year, no adjustment would be made for that period. This establishes that the functioning of the adjustments is independent of the lasting functions of the machine. The adjustments and the lasting machine do not qualify or modify each other: when once adjusted, the adjusting mechanism could be thrown away without affecting the lasting operation. The claims are void because the elements are not "joint tenants of the domain of the invention" covered by the claims: the adjustments have "separate interests and estates" from the lasting machine in its lasting operation.



## POINT II.

**AGGREGATION: ANOTHER FORM OF AN ATTEMPT TO REPATENT EXPIRED OLD COMBINATIONS.**

When an attempt is made to patent an aggregation of two or more elements or old combinations, it is another form of attempted monopoly extension over what has gone into the public domain. Engineering contributions in the common store of knowledge of an industry **cannot be re-dedicated to monopoly without the justification of a new function or a new result from the new teamwork of parts in a new combination**; without such new function or new result there is aggregation because there is only the sum of results, and the associated mechanisms still stay within the public domain. Mere improvements in result or economy of greater success cannot revitalize an aggregation into an invention.

All that McFeely did in the second patent was to substitute in the expired first McFeely patent the prior art adjustments which were old and public property. If there were improvement, it was but the improvement by adding the better adjustments. The operation of the adjustments and the heel seat lasting are not simultaneous but are entirely separate and are independent of one another. There is no true cooperation to make a patentable combination. No new, and useful result is produced by the second McFeely patent from the "cooperating action of the elements."

In the *Grinnell v. Johnson* case, 247 U. S. 426, this Court said:

"The question is, does this bringing together of old elements accomplishing the purposes stated amount to that combination which is invention within the meaning of the patent law; or does the gearing device, thus applied and used, show only an aggregation of old elements performing well-known functions, producing no novel and useful result entitling the aggregation to the protection of a patent?" (pp. 431-2.)

"Applying the rule thus authoritatively settled by this court, we think no invention is shown in assembling these old elements for the purposes declared. **No new function is 'evolved from this combination'; the new result, so far as one is achieved, is only that which arises from the well-known operation of each one of the elements.**" (p. 433.)

The Court of Appeals of the Sixth Circuit erred in sustaining the second McFeely patent because of additions to the expired first McFeely patent of prior art adjustments to make the machine more versatile and in holding that the rule of this Court against extending a patent monopoly applies only when the improvement is in quantity or quality of the product. This ruling is contrary to *Grinnell v. Johnson, supra*, in which this Court held that convenience, economy and superiority do not make an aggregation patentable. The Court said:

**"\* \* \* Phillips may have produced a more convenient and economical mechanism than others who preceded him, but superiority does not make an aggregation patentable. Specialty Manufacturing Co. v. Fenton Metallic Manufacturing Co., supra.** The assemblage of the old elements, and their operation in the manner indicated, may save time, and the mechanism may meet with a readier sale than other similar devices, but these things may result from mechanical skill and commercial enterprise, and do not necessarily involve invention." (p. 434.)

In *Specialty Mfg. Co. v. Fenton*, 174 U. S. 492, 498, *supra*, this Court said:

**"Hoffman may have succeeded in producing a shelf more convenient and more salable than any which preceded it, but he has done it principally, if not wholly, by the exercise of mechanical skill."**

So also the late case of *Toledo Co. v. Standard Parts*, 307 U. S. 350, the patent covered a burner for use in outdoor warning signals such as torches and truck flares. The specification stated that the purpose of the invention was

to increase efficiency and to reduce flame extinguishment by wind and rain, to a minimum.

“The torch body was old in the art to which it belonged. The cap, as part of devices used in other fields, was old and useful to prevent extinguishment of flames by wind or rain and to permit flames to extend through holes to the open air. The problem patentees set for themselves was to prevent extinguishment while preserving usefulness of the flames as warning signals. They solved it by merely bringing together the torch and cap. As before, the torch continued to produce a luminescent, undulating flame, and the cap continued to let in air for combustion, to protect the flame from wind and rain and to allow it to emerge as a warning signal. They performed no joint function. Each served as separately it had done.” (355-6.)

That is exactly the situation as to the McFeely patent in suit. The lasting mechanism was all old in the first expired McFeely patent. (R. Vol. 2, p. 266.) The machine of that patent successfully lasted shoes. All that McFeely did in the patent in suit was to take the old lasting machine of the first McFeely patent and substitute the old adjustments of such patents as Copeland, No. 244,714 (Rec. Vol. 2, p. 114), Lombard, No. 524,445 (Ib. 122), Eaton, No. 596,323 (Ib. 134), Brock, No. 601,935 (Ib. 140), Plant, No. 958,280 (Ib. 180), Brock, No. 188,616 (Ib. 384), Pym, No. 1,368,968, Fig. 10 (Ib. 452), Pym, No. 1,368,968 (Ib. 440), and Snow, No. 946,708 (Ib. 172).

On such a state of facts this Court, in *Toledo Co. v. Standard Parts*, *supra*, said:

“The patented device results from mere aggregation of two old devices, and not from invention or discovery. *Hailes v. Van Wormer*, 20 Wall. 353, 368. *Reckendorfer v. Faber*, 92 U. S. 347, 357. *Lincoln v. Stewart-Warner Corp.*, 303 U. S. 545, 549-50. On the records before us, it is impossible to hold that production of the patented device required more than mechanical skill and originality attributable to those fa-

miliar with the art of protecting flames of kerosene and other burners. *Altoona Theatres v. Tri-Ergon Corp.*, 294 U. S. 477, 486; *Powers-Kennedy Co. v. Concrete Co.*, 282 U. S. 175, 186; *Concrete Appliances Co. v. Gomery*, 269 U. S. 177, 184, 185; *Hollister v. Benedict & Burnham Mfg. Co.*, 113 U. S. 59, 72, 73." (p. 356.)

This Court did not limit the restriction against extending the monopoly by improving one part of an old combination to cases in which the second patent covers a mere improvement in quantity or quality of the product. The true rule as set forth in *Bassick v. Hollingshead*, 298 U. S. 415, is that, although an element is improved in an old construction, the patent is invalid. The evil lies in re-monopolizing a publicly dedicated heel seat lasting machine.

"The question is whether, by this method, the patentee, by improving one element of an old combination whose construction and operation is otherwise unchanged, may, in effect, repatent the old combination by reclaiming it with the improved element substituted for the old element. That this cannot be done is shown by numerous cases in this and other Federal Courts." (p. 425.)

That is exactly what McFeely has done. McFeely took the substituted adjustments from the prior art. This does not render the combination patentable; the approval of such a course, by the Court of Appeals below, makes this Court's decisions ineffective in applying the applicable rule.

This decision of the Court of Appeals is directly contrary to the very recent decision of this Court in *Cuno Engineering v. Automatic Devices*, 62 S. Ct. 37.

"We may concede that the functions performed by Mead's combination were new and useful. But that does not necessarily make the device patentable. Under the Statute 35 U. S. C. Sec. 31, 35 U. S. C. A. Sec.



31, R. S. Sec. 4886, the device must not only be 'new and useful,' it must also be an 'invention' or 'discovery.' *Thompson v. Boisselier*, 114 U. S. 1, 11, 5 S. Ct. 1042; 1047, 29 L. Ed. 76. Since *Hotchkiss v. Greenwood*, 11 How. 248, 267, 13 L. Ed. 683, decided in 1851, it has been recognized that if an improvement is to obtain the privileged position of a patent more ingenuity must be involved than the work of a mechanic skilled in the art. (Cases cited) \* \* \* 'Perfection of workmanship, however, much it may increase the convenience, extend the use, or diminish expense, is not patentable.' *Reckendorfer v. Faber*, 92 U. S. 347, 2 Otto 347, 356, 357, 23 L. Ed. 719. \* \* \* (Cases cited). 'That is to say the new device, however useful it may be, must reveal the flash of creative genius not merely the skill of the calling. If it fails, it has not established its right to a private grant on the public domain.' (pp. 40, 41.)

• The claims of the McFeely patent in suit, being for an aggregation of old devices and the adjustable features relied upon not affecting the operation of the other parts with which they are used, are void. Respondent says the McFeely construction under the instant patent, makes more shoes and lasts them more uniformly with greater perfection of workmanship. Under the law as we understand it, this is not invention.

• **Where Adjustments and the Subsequent Operation After Adjustments are Entirely Separate and Independent of One Another: It is Only Aggregation.**

In the McFeely patent in suit, if you wish to adjust the fore and aft position of the heel band, you do so by moving the handle 92. If you wish to predeterminately adjust the wipers, you move the handle 270. If you wish to adjust the hold-down, you move the stop nut adjacent head 208. Thereafter, having made the adjustments, the machine operates in the lasting operation in the same way irrespective of the adjustments. The lasting operation is merely accommodated to the particular sized shoe by these ad-

justments. The operations of adjustment and the operations of lasting, are entirely independent of one another. The lasting machine would work with or without such adjustments so far as the lasting operation is concerned.

In *Grinnell v. Johnson*; 247 U. S. 426, the patent covered a washing machine operated by an electric motor. The power shaft rotated the dolly in the washer. The power shaft was also geared to a wringer. A clutch sleeve was provided so that the wringer rolls could be reversed by shifting the clutch sleeve and adjustments could be thus made to work the dolly or wringer. After stating that an aggregation of elements is not patentable, this Court said:

“Applying the rule thus authoritatively settled by this court, we think no invention is shown in assembling these old elements for the purposes declared. No new function is ‘evolved from this combination;’ the new result, so far as one is achieved, is only that which arises from the well-known operation of each one of the elements.

“In the gearing specified every element is old. The operations of the wringer and washing machine, although simultaneous, are independent one of the other.” (p. 433.)

The McFeely patent is more of an aggregation—if we may have a comparative of the term—than was the patent in the *Grinnell* case. In McFeely there is never any simultaneous action of the adjusting means and the other old features of the combination. Their actions are always independent and they do not qualify the operation of each other. The lasting features always operate the same regardless of the adjustments, after the adjustments are made—there is no simultaneous operation.

#### **Increasing the Versatility of a Machine Does Not Convert Aggregation into an Invention.**

The merit claimed for the McFeely patent in suit, is that it is a more versatile machine operating on a wider

range of shoes than the first McFeely machine. To what extent it operated on a range of shoes greater in size than the first McFeely patent, is not accurately shown. The respondent's proof was silent on that point, although all the information on the subject was exclusively within its possession.

Merely improving utility does not raise a structure to the rank of an invention. The daily activities of competitive manufacturing and engineering establishments are constantly devoted to increasing the utility of everything that is being manufactured and sold. To hold that comparative utility is a sign of invention would be to throttle rather than promote progress. In the case of *Grant v. Walter*, 148 U. S. 547, 13 S. Ct. 699, 37 L. Ed. 552, Mr. Justice Jackson held:

"The advantages claimed for it, and which it no doubt possesses to a considerable degree, cannot be held to change this result, it being well settled that utility cannot control the language of the statute, which limits the benefit of the patent laws to things which are new as well as useful. The fact that the patented article has gone into general use is evidence of its utility, but not conclusive of that and still less of its patentable novelty." (p. 556.)

This Court repeated this view in *Grinnell v. Johnson*, 247 U. S. 426. It said:

"Phillips may have produced a more convenient and economical mechanism than others who preceded him, but superiority does not make an aggregation patentable. *Specialty Manufacturing Co. v. Fenton Metallic Manufacturing Co.*, *supra*, 174 U. S. 492." (p. 434.)

#### **Superiority of Result or Economy in Results do Not Make an Invention.**

If we rely upon the shadowy distinction of a superior result from a machine as the test of invention, we would have to do the difficult thing of ascertaining how much of

this perfection was due to engineering, how much to sound artisanship and how much to wise selection of materials, and then try to value what is left as invention. Obviously, these complex features so far dominate in a superior result, that invention usually plays a shadowy part in the matter. This is particularly true where the patent under consideration comes at the end of sixty years of steady perfection and detailed improvement in a crowded art; and the machine embodying the alleged invention is that of the most skilled manufacturer in the industry with the greatest number of engineers and designers, as in the case of United Shoe Machinery Corporation. Certainly a generous share of the credit for perfection of result, under such circumstances, must be given to things other than the McFeely three minor adjustments, which at best are claimed by McFeely as mere improvements on old adjustments of the same kind in the first patent. There is nothing here in the second McFeely beyond the skill of the calling that has had sixty years to perfect itself as evidenced by the voluminous prior art, mainly owned by the respondent. The following statements from *Altoona v. American et al.*, 294 U. S. 477, 55 S. Ct. 455, 79 L. Ed. 483, we believe are particularly appropriate to this case where this Court said:

“An improvement to an apparatus or method, to be patentable, must be the result of invention, and not the mere exercise of the skill of the calling or an advance plainly indicated by the prior art. *Electric Cable Joint Co. v. Brooklyn Edison Co.*, 292 U. S. 69, 79, 80. \* \* \* The patentees brought together old elements, in a mechanism involving no new principle, to produce an old result, greater uniformity of motion. However skilfully this was done, and even though there was produced a machine of greater precision and a higher degree of motion-constancy, and hence one more useful in the art, it was still the product of skill, not of invention. *Hailes v. Van Wormer*, 20 Wall. 353, 368; *Grinnell Washing Machine Co. v. Johnson Co.*, 247 U. S. 426, 432-434; *Powers-Kennedy Contracting Corp.*



*v. Concrete Mixing & Conveying Co.*, 282 U. S. 175, 186." (p. 486.)

In *Cuno Engineering v. Automatic Devices*, 62 S. Ct., 37, this Court noted from *Reckendorfer v. Faber*, 92 U. S. 347, 2 Otto 347, 356, 357, 23 L. Ed. 719 as follows:

" 'Perfection of workmanship, however much it may increase the convenience, extend the use; or diminish expense, is not patentable.' " (p. 40.)

### POINT III.

#### COMMERCIAL SUCCESS.

##### Commercial Success Not Essential to Anticipation by Prior Art.

The Court of Appeals below founded its decision on the fact that as between the first McFeely patent and the second, **the second was more successful commercially than the first.** It said that one machine was built in accordance with the first McFeely and:

"Although the machine successfully lasted shoes of specific sizes, it proved incapable of operating satisfactorily upon a range of sizes large enough to adapt it for commercial operation in the ordinary shoe factory. \* \* \*" (R. 510, Vol. 1.)

Then the Court on this ground discarded the first McFeely patent as anticipation because a failure.

This we submit is contrary to the doctrine established by this Court in *Smith v. James* and *Smith v. Hall*, 301 U. S. 216, and numerous other cases. Anticipation cannot be decided on the basis of comparative commercial success between the anticipating structure and the structure of the patent in suit. Even though the anticipating patent structure is not commercially successful, it is still an anticipation if it has already disclosed the principles of the invention to the public. Likewise, reliance upon commercial success is an unsafe ground to sustain a broad monopoly, and is only resorted to in cases of doubt, but even then such

proof can be no substitution for a lack of invention over the prior art, as in this case.

*Textile Machine Works v. Louis Hirsch Textile Machines, Inc.*, 302 U. S. 490-498-499;

*Paramount Publix Corp. v. American Tri-Ergon Corp.*, 294 U. S. 464-474;

*Altoona Publix Theatres, Inc. v. American Tri-Ergon Corp., et al.*, 294 U. S. 477-486;

*DeForest Radio Co. v. General Electric Co.*, 283 U. S. 664;

*Grant v. Walter*, 148 U. S. 547-556.

The Court of Appeals founded its decision on the contrary principle to that established by this Court, that is, that even if the anticipating structure operated successfully, if the machine of the patent in suit was *more* commercially successful, then there could be no anticipation. On this the Court said:

“The first McFeely patent contributed little to the art. But one machine was ever built in accordance with its disclosures and this was sent by the appellee to the Victor Shoe Company for test in the lasting of heel seats under commercial conditions, subject to an arrangement by which no charge should be made to the Victor Company for the work done on the machine, and that any shoes spoiled in its operation should be paid for by the appellee. **Although the machine successfully lasted shoes of specific sizes**, it proved incapable of operating satisfactorily upon a range of ~~sizes~~ large enough to adapt it for commercial operation in the ordinary shoe factory, and after it had been tested for a period it was returned to the manufacturer, was dismantled, and no other similar machine was ever built. On the other hand, the automatic heel lasters of the patent in suit have gone into wide use, the court finding that more than 1200 of such machines had been in operation throughout the world, and both litigants agree that they are complicated and expensive. Between commercial success demonstrated by brief use

of a single machine abandoned and not duplicated, and commercial success of the machine of the second patent, there yawns a wide gulf not to be bridged merely by insistence that the second McFeely patent advanced the art but in minor and inconsequential details." (R. Vol. 1, p. 510.)

This Court, in *Smith v. James, supra*, however, held that commercial success of anticipating prior use structure, is unnecessary. In that case this Court said as to the Hastings prior use:

"It is immaterial that his structure for using the method was neither the best possible nor as skilfully designed or used as that later employed by Smith. *Pickering v. McCullough*, 104 U. S. 310, 319; cf. *Telephone cases*, 126 U. S. 1, 531, 536." (p. 232.)

With reference to the Hastings Brooklyn and Muskoguee prior uses, this Court said:

"\* \* \* the fact that both incubators functioned, are convincing evidence that Hastings knew and used in appropriate combination, both in Brooklyn and in Muskoguee, the essential elements of the Smith claim." (pp. 232-3.)

"He knew the method and used it in a device capable of employing it. In such circumstances want of commercial success, which the record suggests may have been due to lack of technical and business skill, is not an indication that there was no prior use." (p. 233.)

A late comer who perfects the earlier idea, is not an inventor. The only difference was that the second McFeely could handle more sizes than the first McFeely, but the last-  
ing operation and even the type of adjustments were identical in both. It is, of course, immaterial that the second McFeely did a more perfect job of making shoes. In *Hildreth v. Mastoras*, 257 U. S. 27, 34:

"It is not necessary, in order to sustain a generic patent, to show that the device is a commercial success. The machine patented may be imperfect in its opera-

tion; but if it embodies the generic principle, and works, that is, if it actually and mechanically performs, though only in a crude way, the important function by which it makes the substantial change claimed for it in the art, it is enough."

As between the first McFeely and the second McFeely the first is generic and the Court of Appeals found that it "successfully lasted shoes" but not in as wide a range of commercial sizes. Defendant's Exhibit H-2 establishes that the machine of the first McFeely patent was commercially successful. (See quotations R. Vol. I, pp. 471-73.) In the affidavit of Russell (R. Vol. I, pp. 475, 476), plaintiff-respondent admitted that shoes were made upon a machine of the first McFeely patent and were sold as a part of the commercial product of the maker. It was also admitted that this machine was for automatic heel seat lasting and that many shoes were commercially lasted on this machine of certain particular sizes.

Certainly the Court of Appeals erred in disregarding this Court's decision to the effect that commercial success is not a necessary factor in order to make an anticipating machine; and in not holding the patent void in view of the decisions of this Court against repatenting old combinations.

#### **Respondent's Claims as to its First McFeely.**

Respondent founded his case on the representation in the District Court that "the original McFeely was never built, your Honor. The old McFeely patent this witness was talking about, 1,129,881, is the patent which I said was impractical and never used, and the patent in suit purports to improve on that patent in certain respects, \* \* \*." (Statements by respondent's counsel at trial, R. Vol. I, p. 396.)

The defendant was taken by surprise at the position of this plaintiff in denying its own fundamental patent in view



of the fact that the construction of this first McFeely patent was repeatedly adopted as the fundamental, successful construction upon which the second McFeely patent was founded as witness the specification of the second McFeely (p. 1, ll. 18-20; p. 3, ll. 19-23; 84-88; p. 12, ll. 22-24) saying that the second patent merely improved on the first. It was also apparent from examining the plaintiff's machines, Exs. 4 and 7, that the first McFeely was the very essence of those machines to which had been added only the upwiping feature of the second McFeely patent and the modifications of the respondent's Hoyt and Jorgensen patents of the plaintiff which went to "detailed" constructions.

We quote from the file wrapper of the first McFeely patent, and also quote from a reply Affidavit of this respondent when this file wrapper was offered in evidence in this case as Ex. H-2 and considered by the Circuit Court of Appeals.

**Statements of United Shoe Machinery Corporation in File Wrapper of First McFeely, Specification in Second McFeely; and Respondent's Reply Affidavit in this Case. (R. Vol. I, pp. 472-3: 475-6.)**

"\* \* \* that from the said layout drawing detail drawings were made and a full-sized operative machine was constructed which has been employed for lasting heel seats **in the ordinary course of manufacture of many pairs of shoes**"; (Oath of McFeely executed Nov. 24, 1914, first McFeely file wrapper, p. 183.)

"That he has read the accompanying affidavit of said McFeely and believes the same to be true." (Affidavit of Arthur L. Russell corroborating the McFeely affidavit of November 24, 1914 as to successful commercial use; page 184, first McFeely file wrapper.)

"It should be recognized at the beginning of this case that applicant is the first inventor ever to have produced a successful heel seat lasting machine and," etc. (United Shoe attorney in file wrapper of first McFeely, p. 141, in 1913.)

"This application is therefore entitled to such liberal treatment from the Patent Office Examiner as it may be expected that the patent will receive, under these circumstances, from the courts because of its fundamental position in the heel seat lasting art. **An absolutely pioneer invention** is defined by those claims which recite an assembling and heel seat lasting machine because *no one in the art has ever disclosed an organized machine for this work.*" (p. 141, first McFeely file wrapper.)

"There appears to be no dispute about the novelty of the combinations recited in these claims and if the utility of the combination were challenged, applicant would bring forward **conclusive evidence of the greatly improved results** obtained by tensioning the upper forwardly and lasting the heel seat while the tension is maintained as herein described." (p. 143, first McFeely file wrapper.)

"Neither that inventor nor any one else during more than a quarter of a century had the constructive genius to see that such forward pulling and holding mechanism and heel seat lasting mechanism as applicant has combined could be **correlated in an organized machine and made to produce important results in shoemaking.**" (p. 144, first McFeely file wrapper.)

"As applicant is advised, the combination of lasting means and a back stop with adjusting and indicating means as required has not before been shown in the lasting machine art." (United Shoe attorney in file wrapper of first McFeely, p. 124.)

"In Fig. 18 the back stop shown as formed on a rack bar adjustable by a shaft 690 having a handle at the side of the machine with a pawl in it to engage a locking ratchet 691 having marked on it graduations indicating **the proper adjustment for different sizes. The ratchet can be adjusted to position the graduations for different groups of sizes such as men's, women's or children's sizes.**" (Lines 79-88, p. 4 of first McFeely patent.)

"Applicant takes the position that this combination is a new and patentable invention involving a material

advance in the shoemaking art and **affording practical results of very substantial value** and therefore, in the absence of other references, he must request the allowance of the claims above mentioned." (United Shoe attorney in file wrapper of first McFeely, p. 114.)

"As to general structure, power transmission and automatic control the machine shown herein corresponds to the machine shown in my patent No. 1,129,881, previously referred to." (Lines 19 to 23, p. 3 of second McFeely patent.) (R. Vol. I, p. 15.)

"The machine was, as stated in the arguments made in the file wrapper, 'a pioneer invention,' in that it was the **first machine for automatic heel seat lasting, and many shoes were successfully lasted upon it, of certain particular sizes.**" (Russell Reply affidavit filed by Respondent.) (R. Vol. I, p. 476.)

The District Court refused such proof as being offered too late, although it was tendered before argument and decision of the case; the proof was considered by the Circuit Court of Appeals. We ask this Court to compare the statements in this filewrapper and this late Affidavit, with the original representation of this respondent by its counsel "the original McFeely was never built, Your Honor" (R. Vol. I, p. 396) as the reason for discovering the first McFeely as an anticipating patent, and also weigh the respondent's statements now that the first machine was not successful, against its sworn statements to the contrary when it was seeking the first patent from the Patent Office.

As a matter of equity, we submit that the respondent is estopped to claim that its first machine of its first patent was not a commercial success in the making of shoes of various sizes in quantity successfully on such an undisputed record of the respondent's own making. Statements against interest in a filewrapper are binding against this respondent. *Schriber-Schroth Co. v. Cleveland*, 311 U. S. 211. However, it makes no difference as a matter of law, whether the first machine was successful or not commer-



cially: the second patent in suit recognized it as being the same machine except for the minor improvements of the improved adjustment, and anticipation does not depend on commercial success.

In conclusion, we submit that in a Court of Equity the proof of the truth is never too late—the Chancellor's conscience requires it and the public's interest demands it.

“The public is always a third party to an infringement suit, and its rights may not be waived \* \* \*.”

*Kellogg v. Michigan, et al.*, 99 F. (2d) 203 (C. C. A. 6);

*Commercial v. Fulton*, 93 F. 621 (C. C. A. 2); and *Paxson v. Board*, 201 F. 656 (C. C. A. 3).

Equally, frankness with a Court by a plaintiff is a prerequisite to a favorable judgment. The applicable rule, as we understand it, is that stated by this Court as to the duty of a party where it said in *Keystone v. General Excavator Co.*, 280 U. S. 240-44-45:

“He must be frank and fair with the Court, nothing about the case under consideration should be guarded, but everything that tends to a full and fair determination of the matter in controversy should be placed before the Court.”

*Worden v. California Fig Syrup Co.*, 187 U. S. 516-528.

**Commercial Success is Not the Measure of Invention: Unpatentable Combinations Often have Great Success and Great Inventions Often Fail Commercially.**

To hold otherwise would substitute commercial success for inventive talent and the diligence of the salesman for the genius of the inventor. The object of invention is to teach the public how to make a new combination or secure a new result which is patentable, or both: the crudity of the suggestion is not important.



There is no additional requisite that the inventor must have the skill of the successful manufacturer, be versed in the arts of salesmanship, and have the sound business judgment of the financier. If commercial success were the test of invention, we would compare the balance sheets of businesses and not compare patents and the state of the art. This Court has long held that the commercial factor is of little weight because so many factors other than invention enter into commercial success, and if the earlier inventor has made his invention disclosures, which are useful even in a limited degree, he has opened the door for successful exploration of his ideas for the public benefit by the skilled manufacturer equipped with all the engineering and mechanical aids usually denied to an inventor in the early stages of a pioneering enterprise.

Heel seat lasting machines with their thousands of parts, which are the result of the countless efforts of many workers in this art for sixty years, are impressive machines to those who forget that these machines were not the creation of the patent in suit: the lower Courts who saw them were accordingly impressed. The patent in suit came only at a time at the end of this long development period of sixty years and contributed nothing but those meticulous refinements characteristic of a well worked industry.

Embodied in such machines are the patient toil and efforts of countless engineers and manufacturers for sixty years in an endeavor to perfect, adjust and speed up by engineering and manufacturing skill an old combination of parts securing a result that was conceived by Copeland sixty years ago. To assume that all this is due to the last McFeely patent is to give the last comer the awards of the pioneer and to shut out the public from its rightful public domain. Herein lies the error of the Courts below: they mistook the physical embodiments before their eyes at the end of the period for the patent in suit because that patent had wrongfully remonopolized all that had gone before and

was long since the public's. Such are the evils of the type of claims we seek to defeat here!

As said in the concurring opinion of Mr. Chief Justice Stone in *Cuno Engineering v. Automatic Devices*, 62 S. Ct. 37 with reference to the improvements claimed in the Mead patent:

"\* \* \* If they exhibited only the skill of the art their success cannot be relied on to establish invention by Mead \* \* \*." (p. 42.)

In *Toledo Co. v. Standard Parts*, 307 U. S. 350, this Court held that commercial success is without significance in a case like this. It said:

"Lack of novelty being clearly shown, acceptance of license under the circumstances of this case, is without weight. *Thropp's Sons Co. v. Seiberling*, 264 U. S. 320, 330. *John T. Riddell v. Athletic Shoe Co.*, 75 F. (2d) 93, 95. And similarly without significance on the question of novelty is the fact that, as plaintiff claims, utility resulted and commercial success followed from what patentees did. *Firestone Tire & Rubber Co. v. U. S. Rubber Co.*, 79 F. (2d) 948, 954." (pp. 356-7.)

Additionally, as in *Thropp v. Seiberling*, 264 U. S. 320-28-29, the mere fact that you are able to speed up production by refinements in a machine or by more perfect workmanship or better engineering design, to get a more uniform product, is no indication of invention.

"\* \* \* In the making of tires, it has in fact resulted, because of the use of power, in speed of manufacture and possibly in some greater uniformity of the product. But the record does not show that there has been substantial change in the mechanics or method of making. The steps are the same and the succession from one to the other are as in the manual art, and the transfer from hand to power was by the usual appliances and had all been indicated before the State patent.

"These conclusions as to the lack of novelty in the elements and combinations of the State patent were

reached by the Circuit Court of Appeals for the Sixth Circuit and we agree with them."

The primary claim for the second McFeely is that it turned out shoes of greater uniformity with less variation due to the human element, and more of them. This, we submit is the expected contribution of engineers and manufacturers in refining a production machine in details after sixty years of effort from the original disclosure by Copeland of all the essentials of heel seat lasting machines. The public is entitled to some liberty of action for its designers and manufacturers because otherwise the disclosure of such an inventor, as Copeland, would be of no public advantage.

It follows that any commercial success claimed for McFeely is of no consequence because the patent is clearly void.

#### POINT IV.

##### PUBLIC IMPORTANCE.

Twelve hundred of the machines embodying the McFeely patents are under lease by the respondent. (R. Vol. I, 399, 483.) As automatic heel seat lasting is one of the fundamental features of shoe making, the tribute upon the shoe industry which must inevitably be reflected in the cost of shoes, thereby very gravely affects the public interest. **Only one with the clearest title to monopoly should have this generous reward under such circumstances.**

Respondent already stands condemned by the Circuit Court of Appeals for the Sixth Circuit for attempting to extend its monopoly on this same mechanism in the Hoy patent in suit No. 1,508,394. (R. Vol. I, p. 513.) The action of respondent in abandoning the application in the United States Patent Office of the second McFeely patent in suit for ten months and then reviving it, is another phase of what was heretofore the prevalent practice of extending a monopoly. This Court stopped one phase of such a practice in *Bassick v. Hollingshead*, 298 U. S. 415, and *Lincol*



*v. Stewart Warner Corp.*, 303 U. S. 545. • Congress has recently rendered illegal the practice of extending monopoly by abandonment and revival. U. S. C. A., Title 35, Sec. 41, provides that a patent shall be withheld unless the final fee is paid within six months after the allowance of the application except that the Commissioner in his discretion may receive the final fee during the year following the six month period.

The large number of patents of this respondent, many of which are in this record, make it essential to the public interest that this vast monopoly over the shoe industry be limited strictly in accordance with the principles announced by this Court. The respondent has followed the practice of building one patent upon another. The second McFeely patent specifically states that it is the same as the first McFeely patent *except* for the *improved* adjustments and the addition of the feature of upwiping, which in itself was old. But it was not content to *claim* these specific improvements: it reclaimed the entire combination including the specific improvement, just as if it were a virgin discovery. A glance at other patents of the respondent in this record will show that this practice has been followed in other of its patents, that is, building one patent upon another *ad infinitum*. This practice will not serve the public.

Let us look at a practical situation in the designing room of a manufacturer to see how a patent like this disturbs the public interest. Engineers and manufacturers who examine expired patents have a right to assume that their subject matter has been dedicated to the public. They have a right, furthermore, to add improvements to this dedicated subject matter to modernize it, make it operate more successfully with greater production, and make it easier to manufacture. They have a right to expect that this monopoly, thus expired, is not going to be remonopolized by the inventor who has had his day of monopoly



and who is doing nothing more in a second patent such as this, than what these engineers are doing in the ordinary course of their day's work. To permit expired patents not to expire by approving the practice of this respondent, as the Circuit Court of Appeals has approved it, in this case, merely means that **no one can be sure that the subject matter of expired patents is accordingly dedicated to the public.** Only long and laborious searches and investigations as to subsequent patents will ever determine whether the old monopoly is at last laid to rest. We ask this Court to continue its charter of freedom for the use of the subject matter of expired monopolies written by this Court into the cases of *Bassick v. Hollingshead*, 298 U. S. 415, and *Lincoln v. Stewart Warner*, 208 U. S. 545. It is only by doing this that we "Promote the Progress of Science and the Useful Arts."

We submit that the public should not be shut off from the use of the fundamentals of heel seat lasting machines, old and public property, by reasons of disclosures made sixty years ago, just because a late comer adds three improved adjustments; and not new adjustments at that. Not a single legal reason has been advanced, that has any foundation in any decision of this Court, why this second McFeely patent should be sustained. The production of more shoes, better workmanship, greater uniformity, greater accuracy, greater speed, a wider range of shoe sizes handled in a single machine, are all contributions of its engineer and manufacturer, and do not come from the flash of genius of the inventor.

It is respectfully submitted that the claims in suit should be held void and the decisions of the Court of Appeals and District Court reversed because:

1. It is unfair to the public to extend a monopoly once enjoyed, that has expired, because no one can know when the contents of an expired patent are actually open to the public to use.

2. It makes no difference whether the improvements inserted in the old combination are new or better or *per se*. It was error to try to protect whatever advantage came from such improvements by attempting to add to them an old combination that the public should have had a right to use and then claim in such old combination such improvements in such general terms as to read upon old adjustments also open to the public. The claims in this case are very general and broad in terms and implications.

Respectfully submitted,

H. A. TOULMIN, JR.,

ROWAN A. GREEB,

JAMES B. O'DONNELL,

*Counsel for Petitioner.*

Oct. 27, 1925.

R. F. McFEELY  
LASTING MACHINE

1,558,737

Original Filed Aug. 16, 1916 6 Sheets-Sheet 1

TACKERS CO-OPERATING WITH WIPERS & HAVING MEANS TO MAINTAIN THEM IN PREDETERMINED RELATION WITH THE WIPER PLATES IN ALL POSITIONS OF ADJUSTMENT

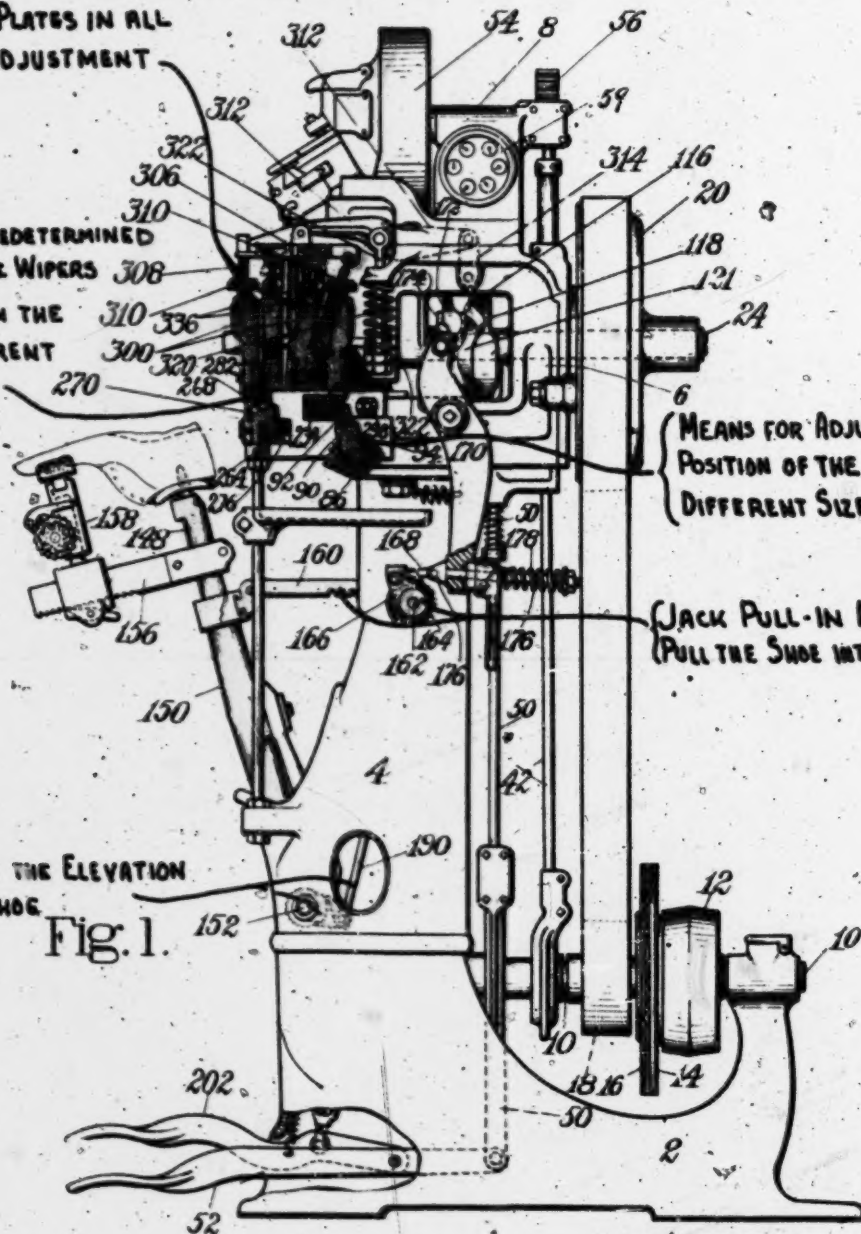
MEANS FOR THE PREDETERMINED ADJUSTMENT OF THE WIPERS TO INITIALLY POSITION THE WIPERS FOR DIFFERENT SIZES OF SHOES

MEANS FOR ADJUSTING THE IN&OUT POSITION OF THE HEEL BAND FOR DIFFERENT SIZES OF SHOES

JACK PULL-IN MECHANISM TO PULL THE SHOE INTO THE HEEL-BAND

MEANS TO CHANGE THE ELEVATION OF THE JACK & SHOE

Fig. 1.



INVENTOR.

Ronald F. McFeely  
By his Attorney  
Nelson M. Howard

Oct. 27, 1925.

R. F. McFEELY  
LASTING MACHINE

1,558,737

Original Filed Aug. 16, 1916 6 Sheets-Sheet 2

TACKERS CO-OPERATING WITH WIPERS & HAVING MEANS TO MAINTAIN THEM IN PREDETERMINED RELATION WITH THE WIPER PLATES IN ALL POSITIONS OF ADJUSTMENT

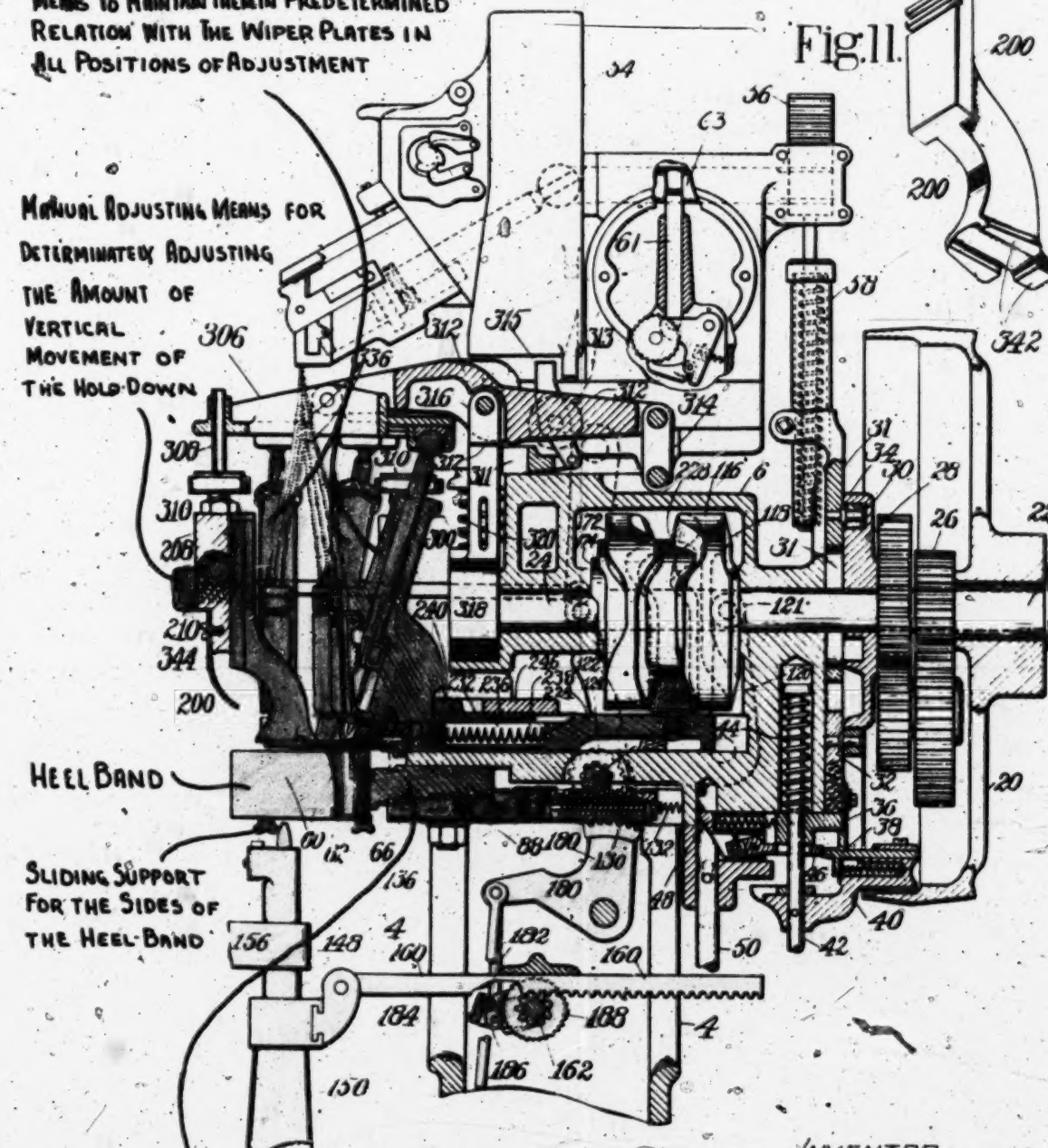
MANUAL ADJUSTING MEANS FOR DETERMINATELY ADJUSTING THE AMOUNT OF VERTICAL MOVEMENT OF THE HOLD-DOWN

HEEL BAND

SLIDING SUPPORT FOR THE SIDES OF THE HEEL-BAND

MEANS FOR ADJUSTING THE IN&OUT POSITION OF THE HEEL BAND FOR DIFFERENT SIZES OF SHOES

Fig. 2.



INVENTOR.

Ronald F. McFeely  
By his Attorney  
Nelson M. Howard



Oct. 27, 1925.

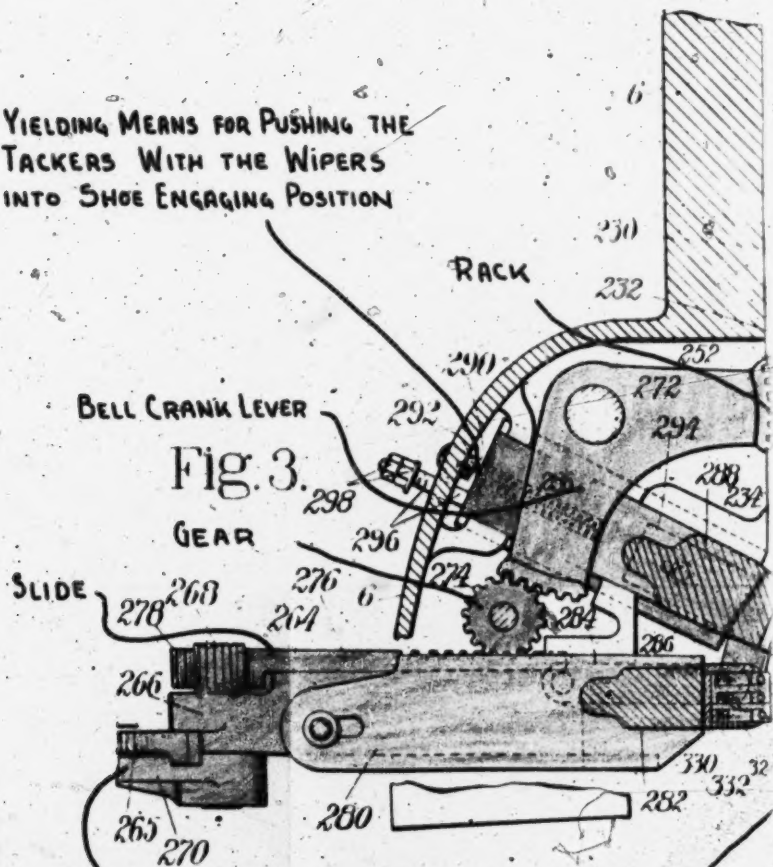
R. F. McFEELY

LASTING MACHINE

Original Filed Aug. 16, 1916

CAM OPERATED  
WIPER SLIDE

YIELDING MEANS FOR PUSHING THE  
TACKERS WITH THE WIPERS  
INTO SHOE ENGAGING POSITION



HAND LEVER FOR ADJUSTING  
THE WIPERS AND THE TACKERS  
INDEPENDENTLY OF THE  
POWER MEANS

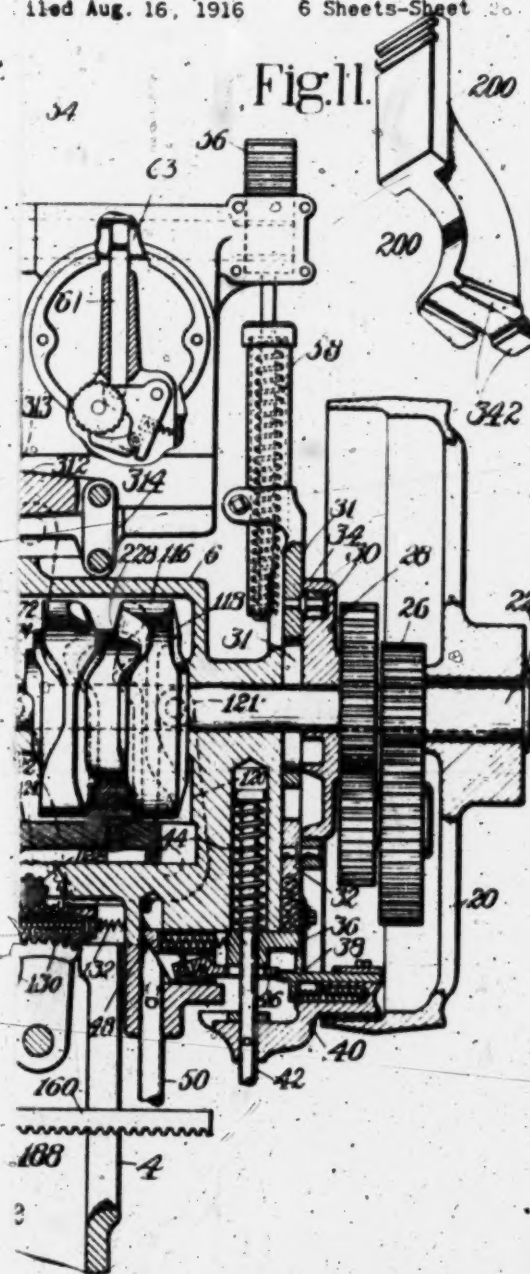
SIDE  
TACKING  
UNIT

1,558,737

McFEELY

ING MACHINE

Filed Aug. 16, 1916 6 Sheets-Sheet 2



INVENTOR

*R. F. McFeely*  
By *his attorney*  
*Charles H. H. H. H.*

Oct. 27, 1925.

R. F. McFEELY

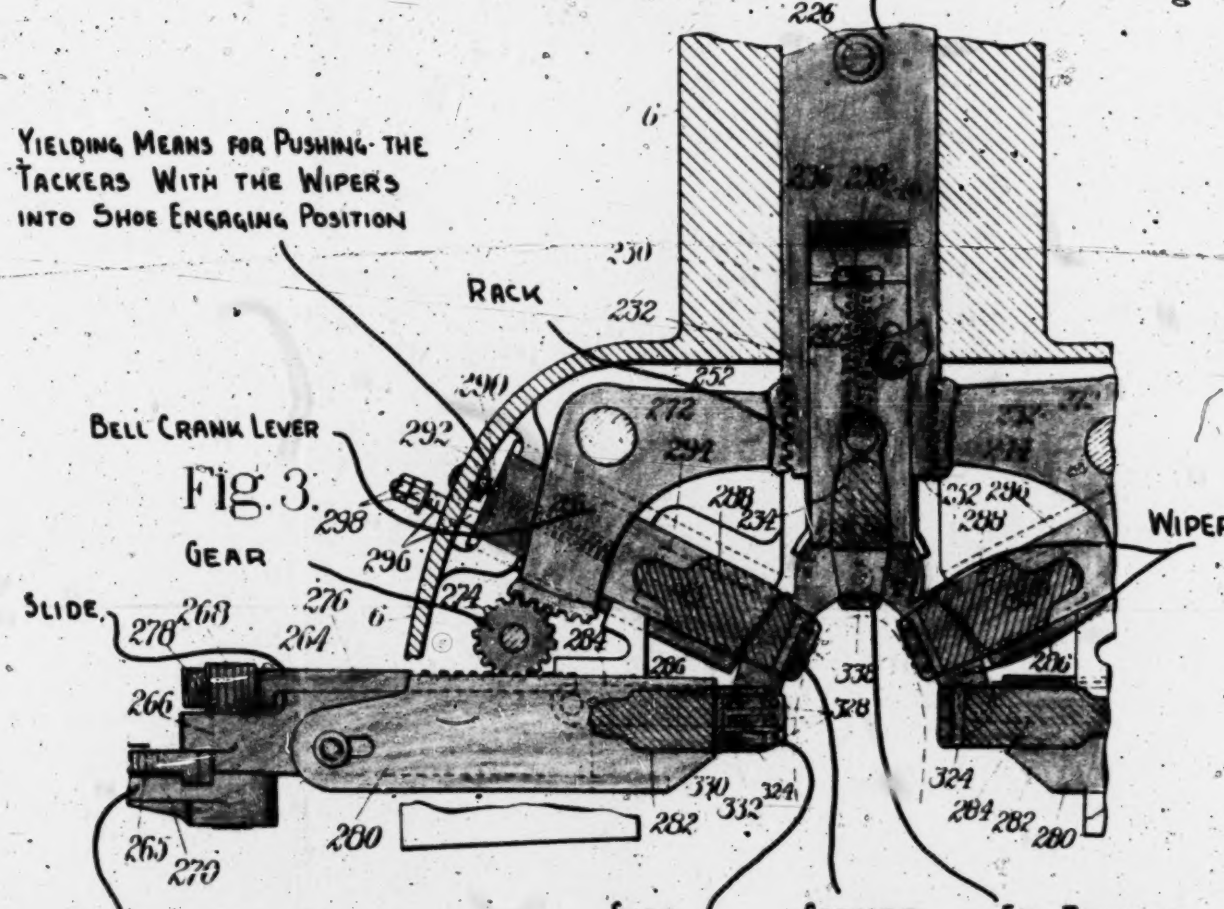
LASTING MACHINE

Original Filed Aug. 16, 1916 6 Sheets-Sheet 3

1,558,737

CAM OPERATED  
WIPER SLIDE

YIELDING MEANS FOR PUSHING THE  
TACKERS WITH THE WIPERS  
INTO SHOE ENGAGING POSITION



HAND LEVER FOR ADJUSTING  
THE WIPERS AND THE TACKERS  
INDEPENDENTLY OF THE  
POWER MEANS

SIDE  
TACKING  
UNIT

CORNER  
TACKING  
UNIT

END TACKING  
UNIT

INVENTOR

*R. F. McFeely*  
By *his attorney*  
*Charles H. H. H.*





Oct. 27, 1925.

1,558,737

R. F. McFEELY

LASTING MACHINE

Original Filed Aug. 16, 1916

6 Sheets-Sheet 4

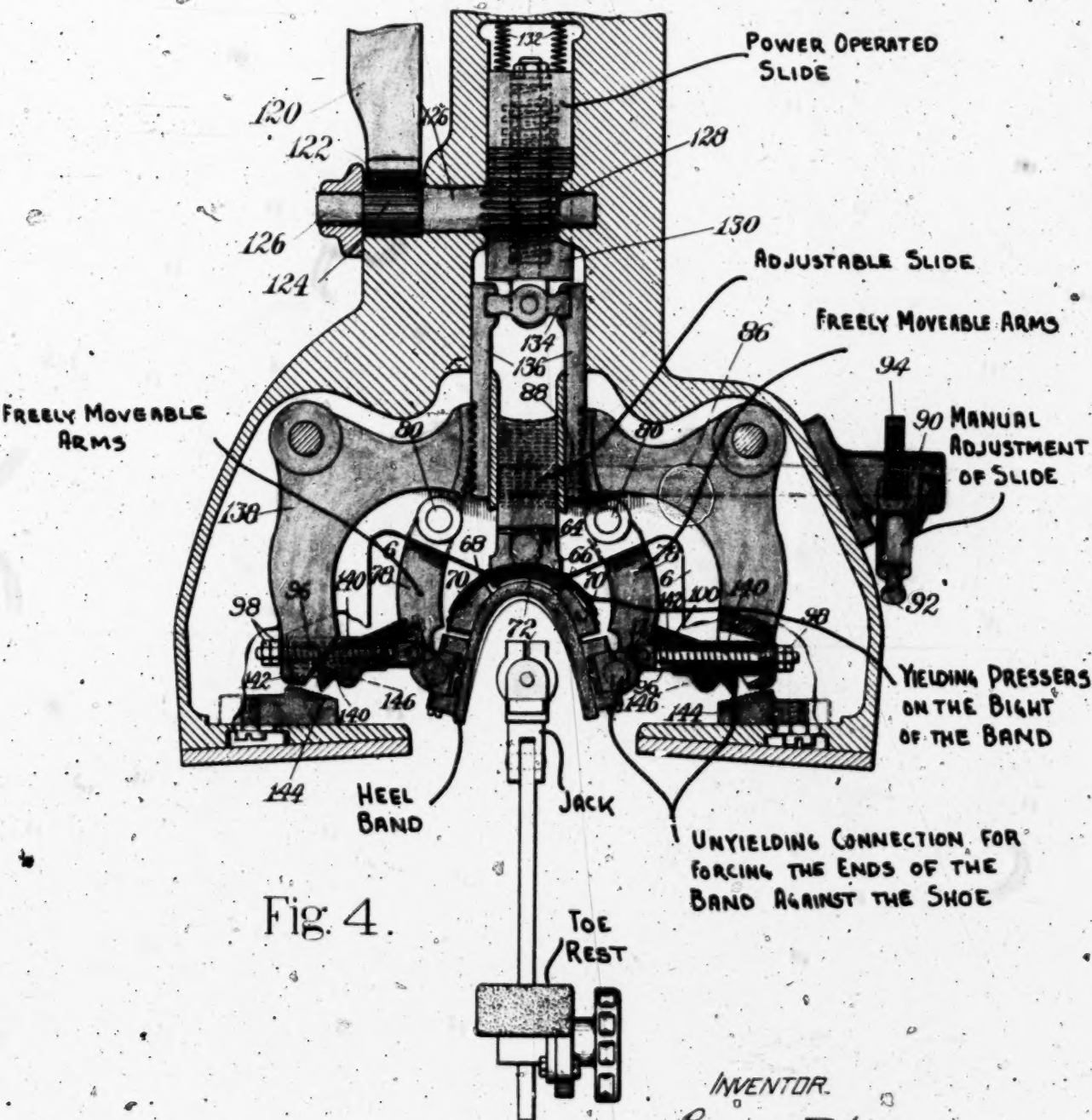
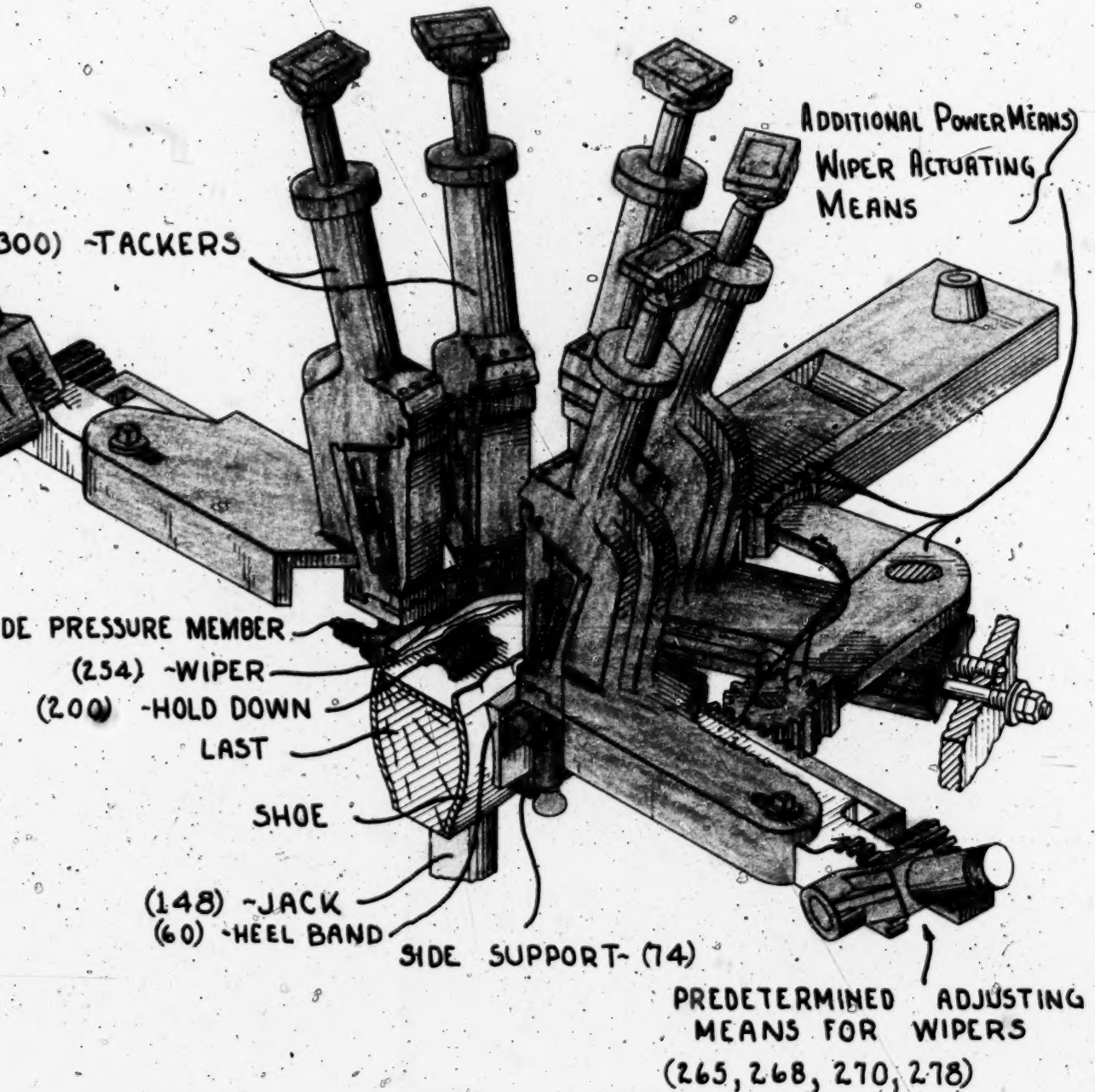


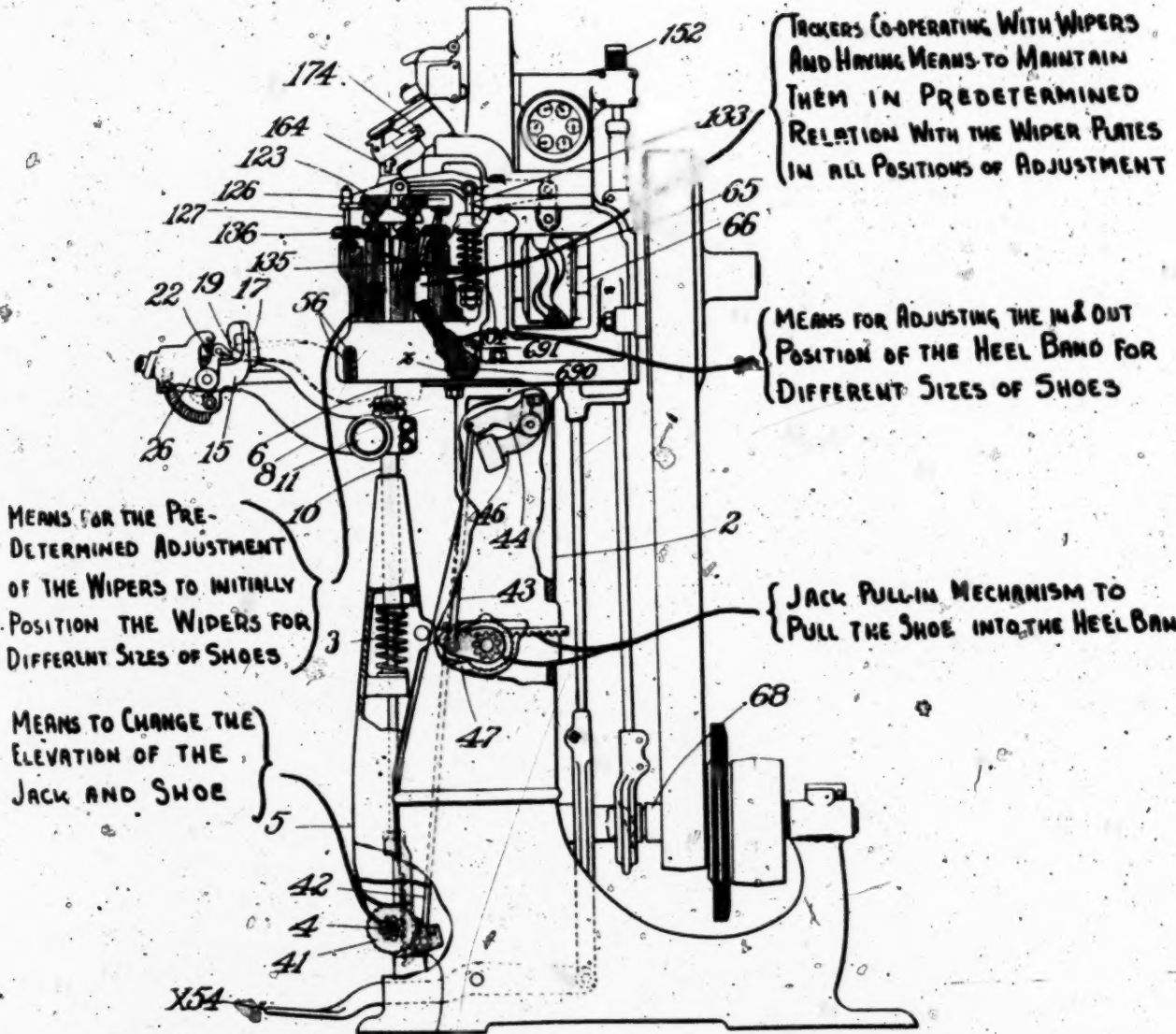
Fig. 4.

INVENTOR.

Ronald F. McFeely  
By his Attorney  
Nelson W. Howard

R. F. McFELY  
1,558,737





WITNESSES: 47

*Elizabeth C. Coyle*  
*Edith C. Hollbrook*

Fig. 1.

INVENTOR:

*Ronald P. McFarley*  
*By his Attorney*  
*Nelson M. Howard*



TACKERS CO-OPERATING WITH WIPERS & HAVING MEANS  
TO MAINTAIN THEM IN PREDETERMINED  
RELATION WITH THE WIPER PLATES  
IN ALL POSITIONS OF ADJUSTMENT

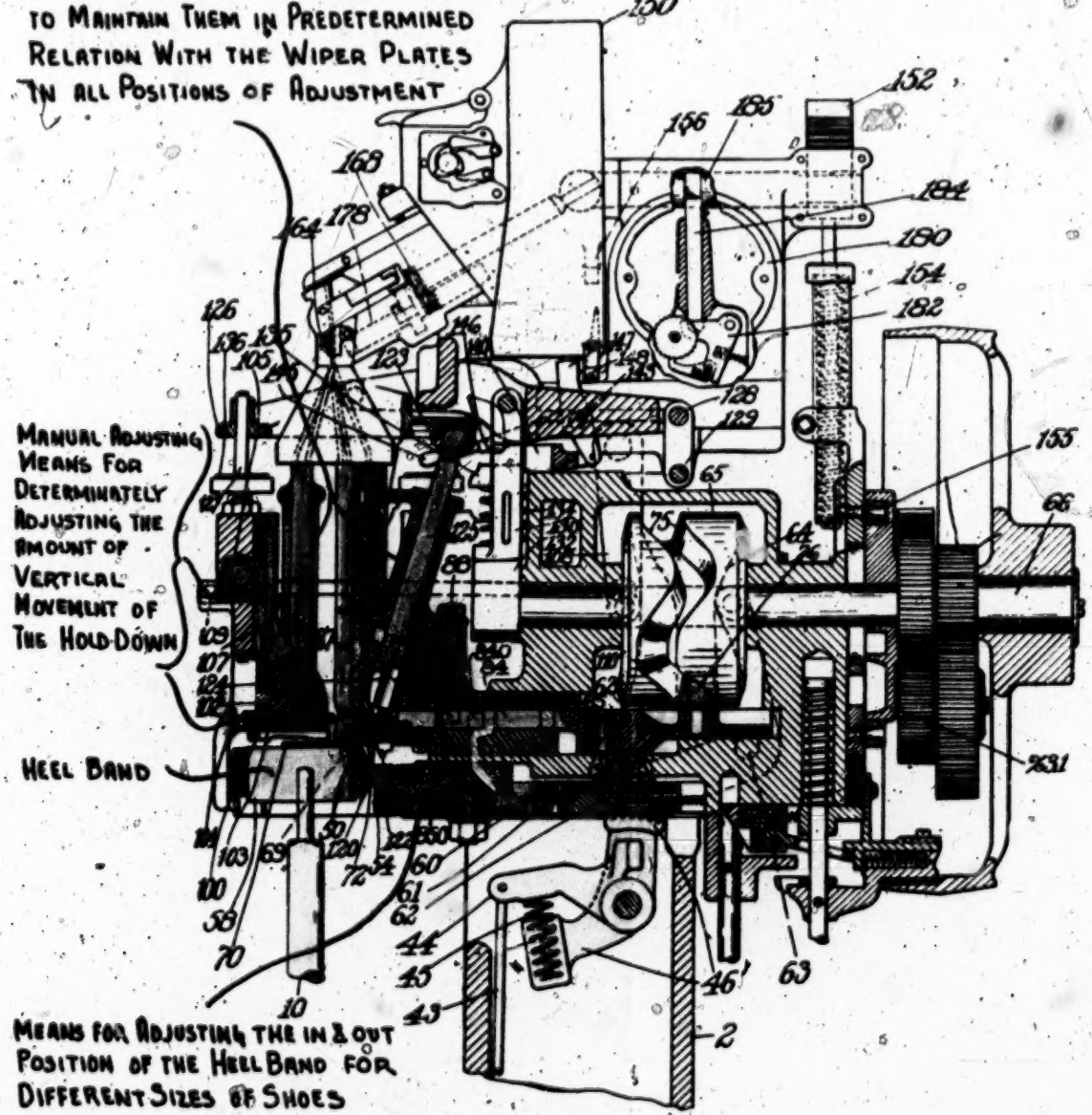
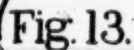


Fig. 2.

WITNESSES.  
Elizabeth C. Cagle  
Luth & Hallbrook

INVENTOR.  
Ronald F. Hartley  
By his Attorney,  
Helen M. Howard

1985

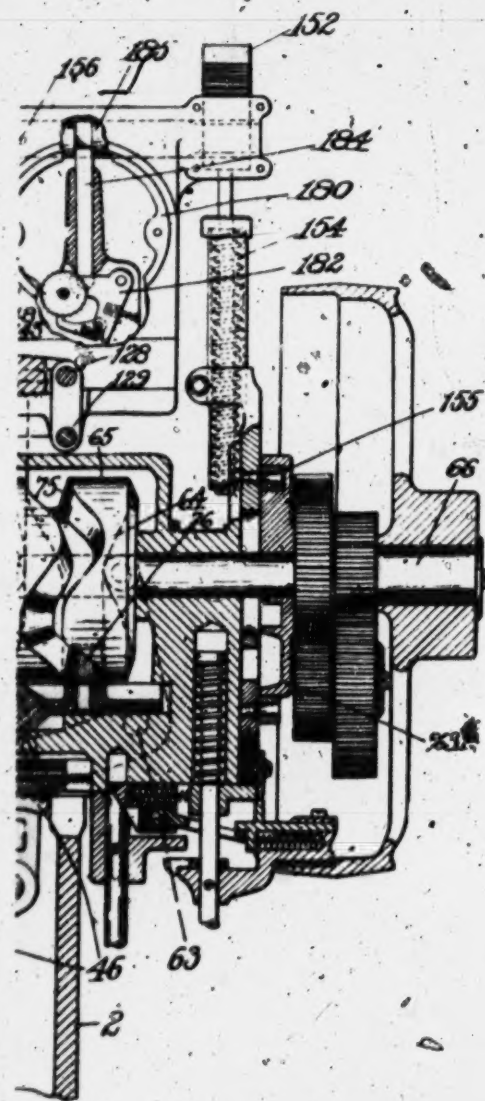


END  
TACKING  
UNIT

MANUAL MEANS FOR DETERMINATELY  
ADJUSTING WIPERS AND TACKERS  
INDEPENDENTLY OF THE POWER MECH



150



2.

INVENTOR  
Ronald F. Hotzky  
By his Attorney  
H. L. McDonald

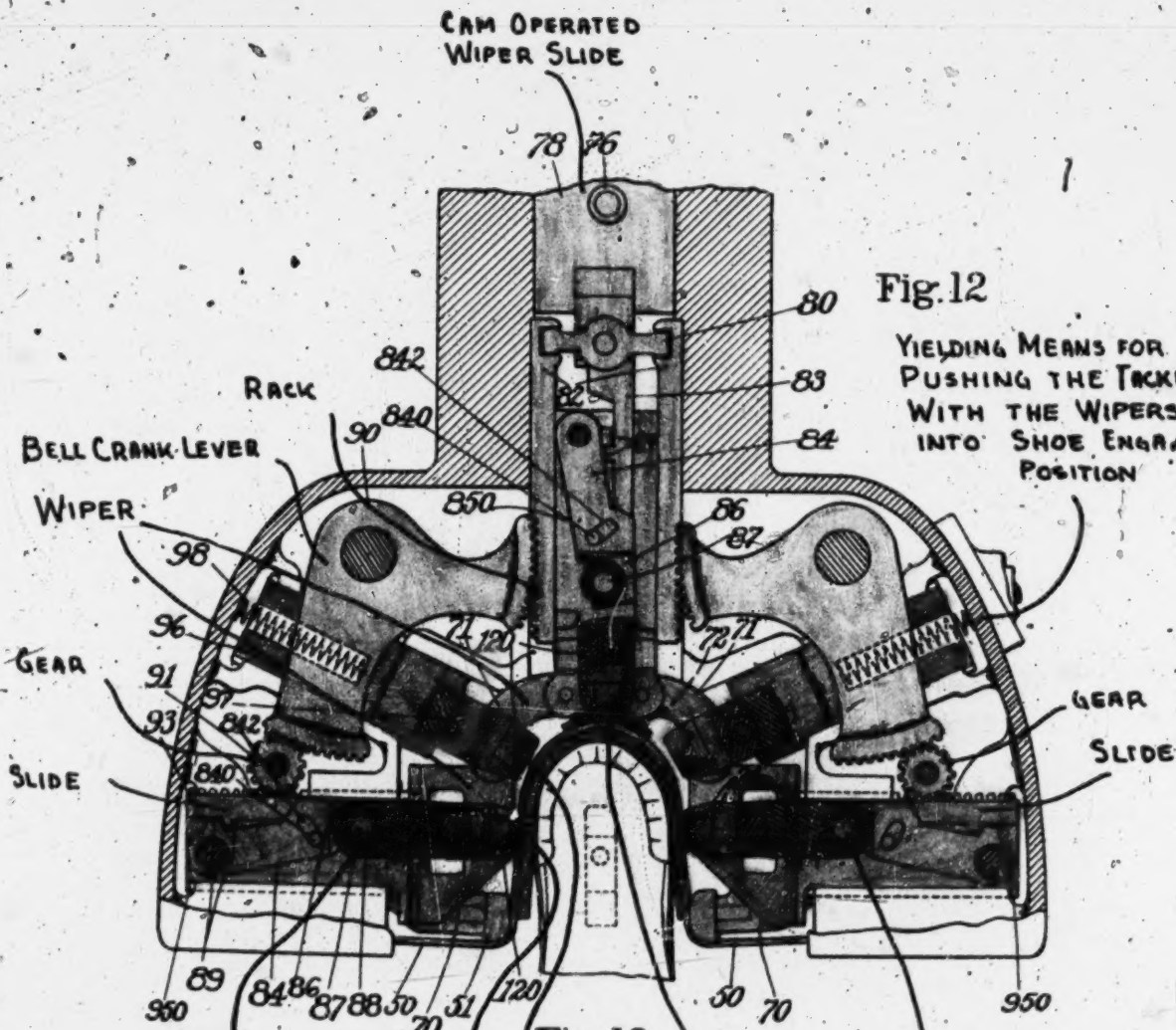


Fig. 12

YIELDING MEANS FOR  
PUSHING THE TACKERS  
WITH THE WIPERS  
INTO SHOE ENGRAING  
POSITION

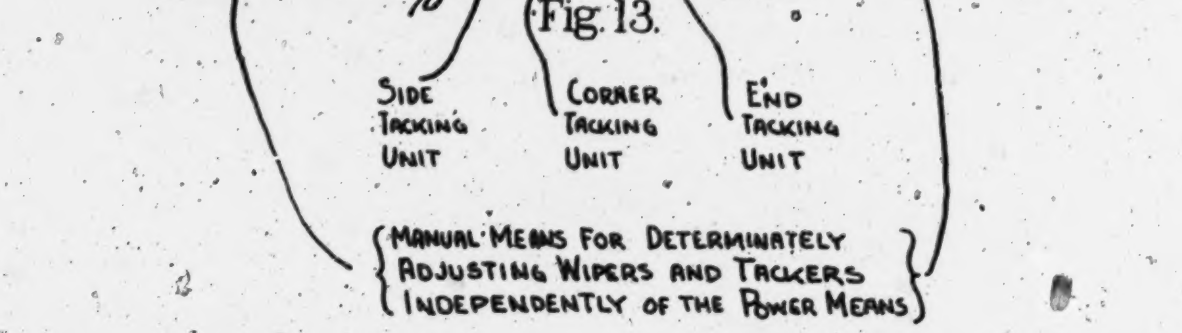


Fig. 13

SIDE  
TACKING  
UNIT

CORNER  
TACKING  
UNIT

END  
TACKING  
UNIT

{ MANUAL MEANS FOR DETERMINATELY  
ADJUSTING WIPERS AND TACKERS  
INDEPENDENTLY OF THE POWER MEANS }

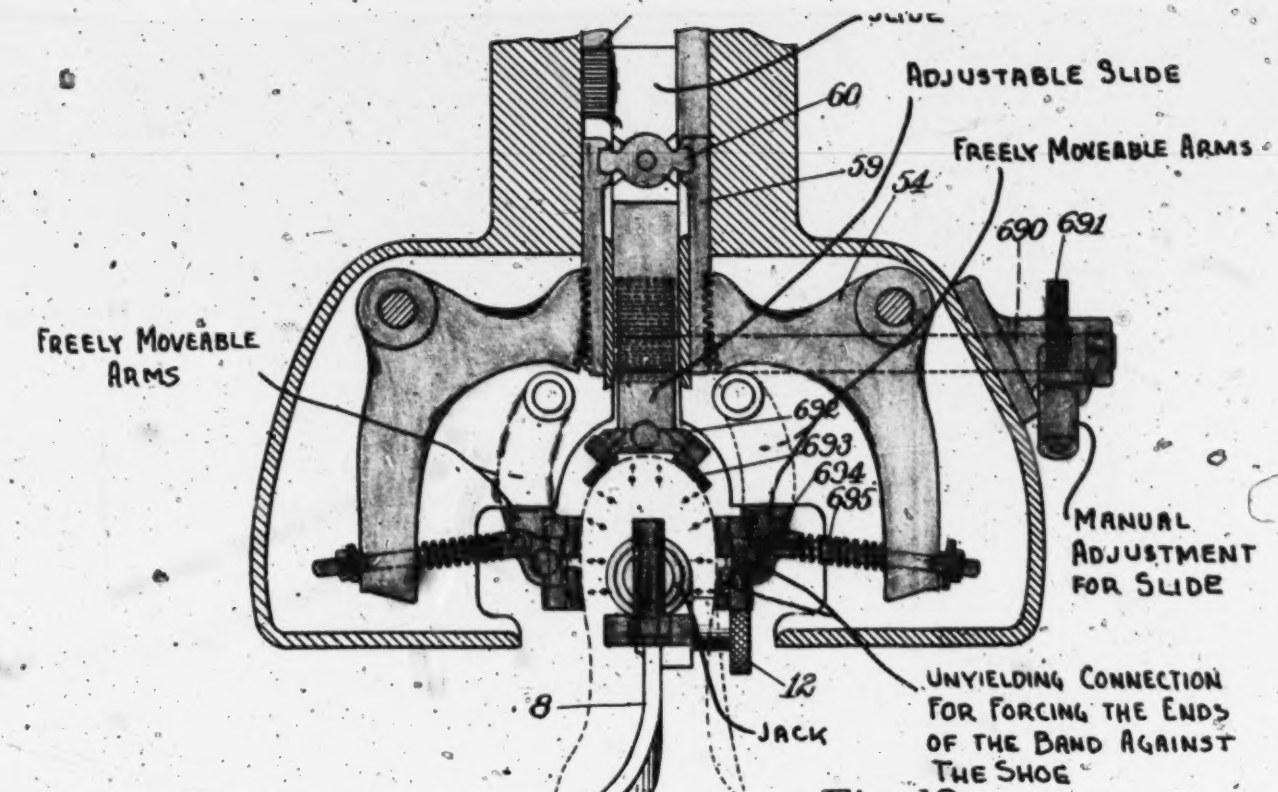


Fig. 18

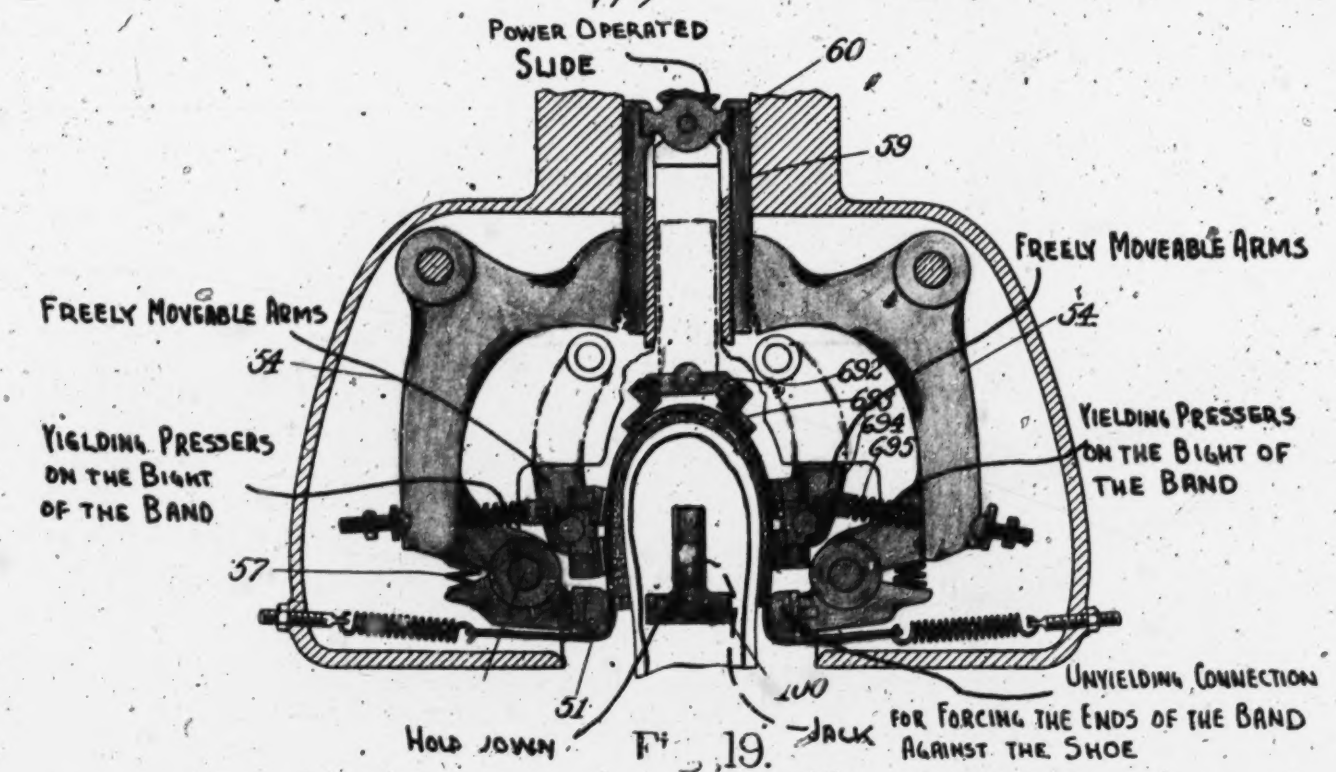
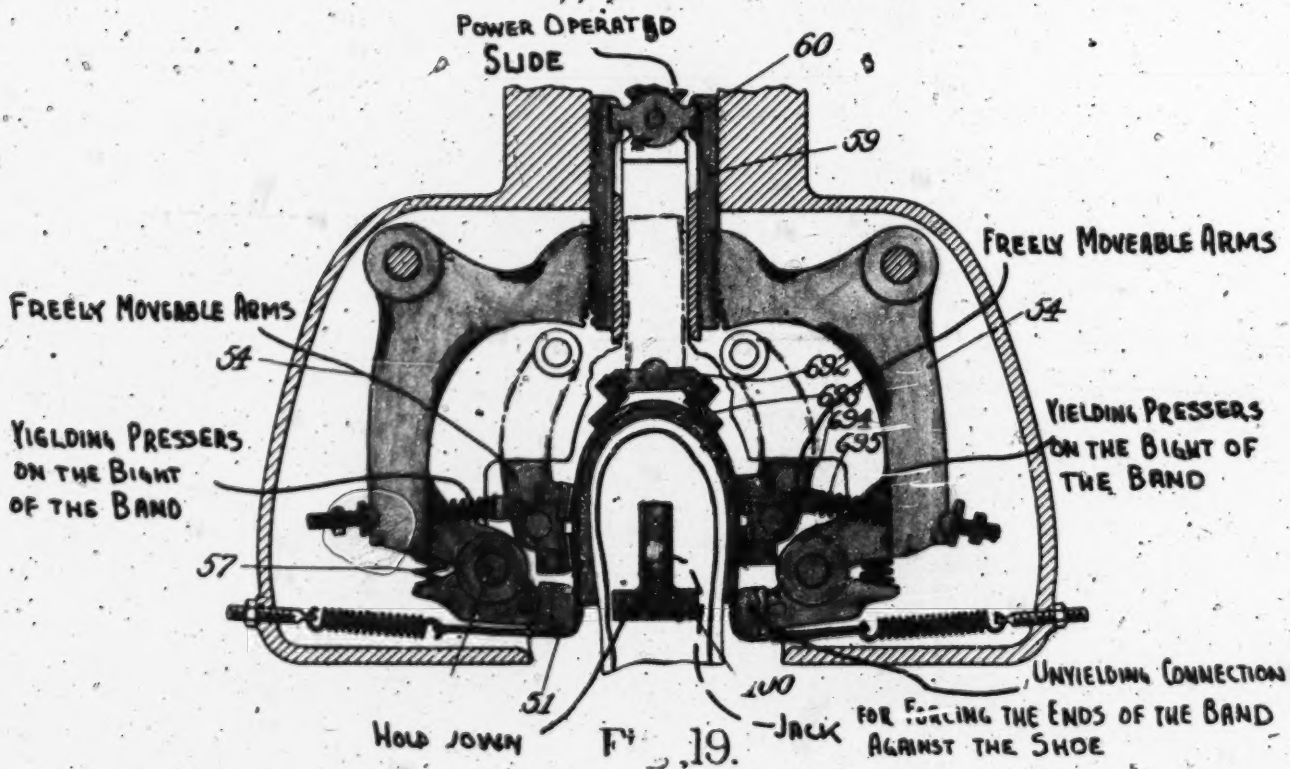
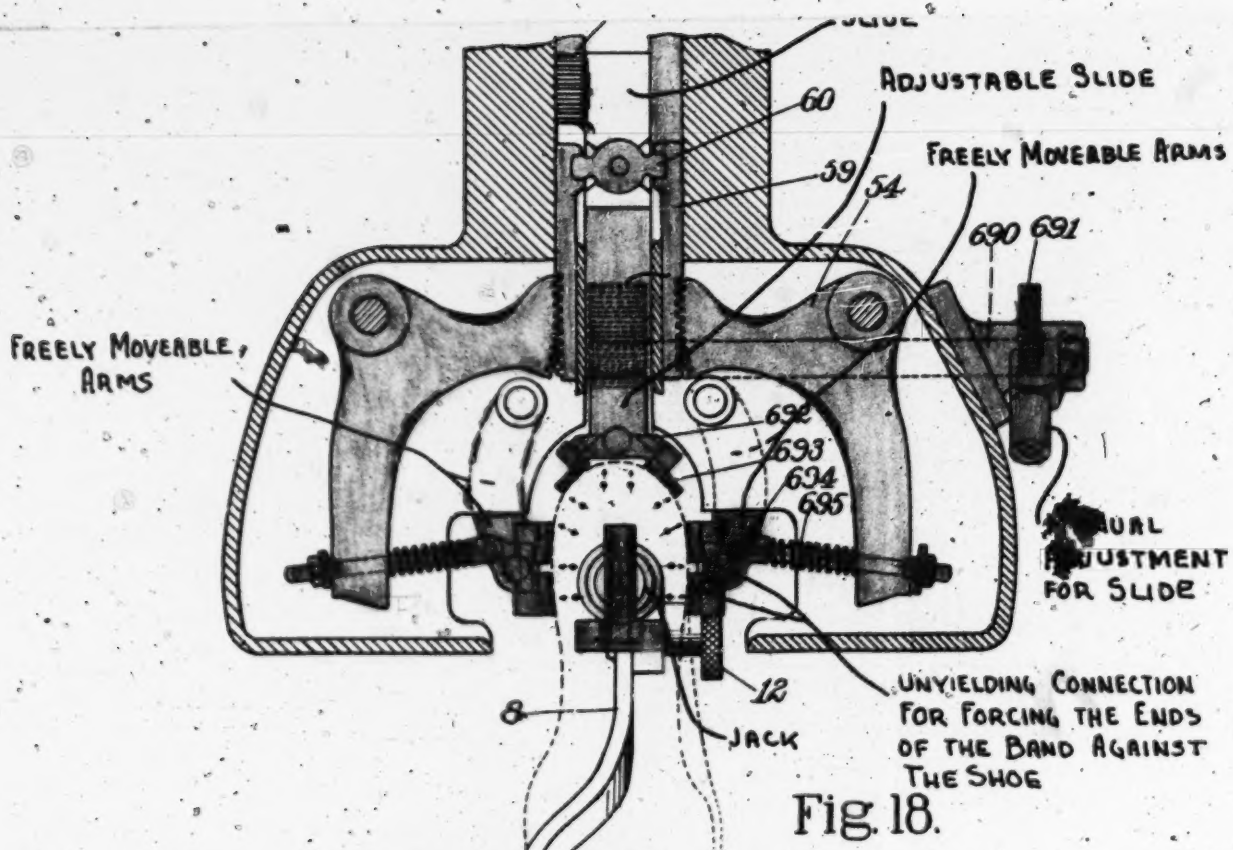


Fig. 19





ADDITIONAL POWER MEANS }  
WIPER ACTUATING MEANS }

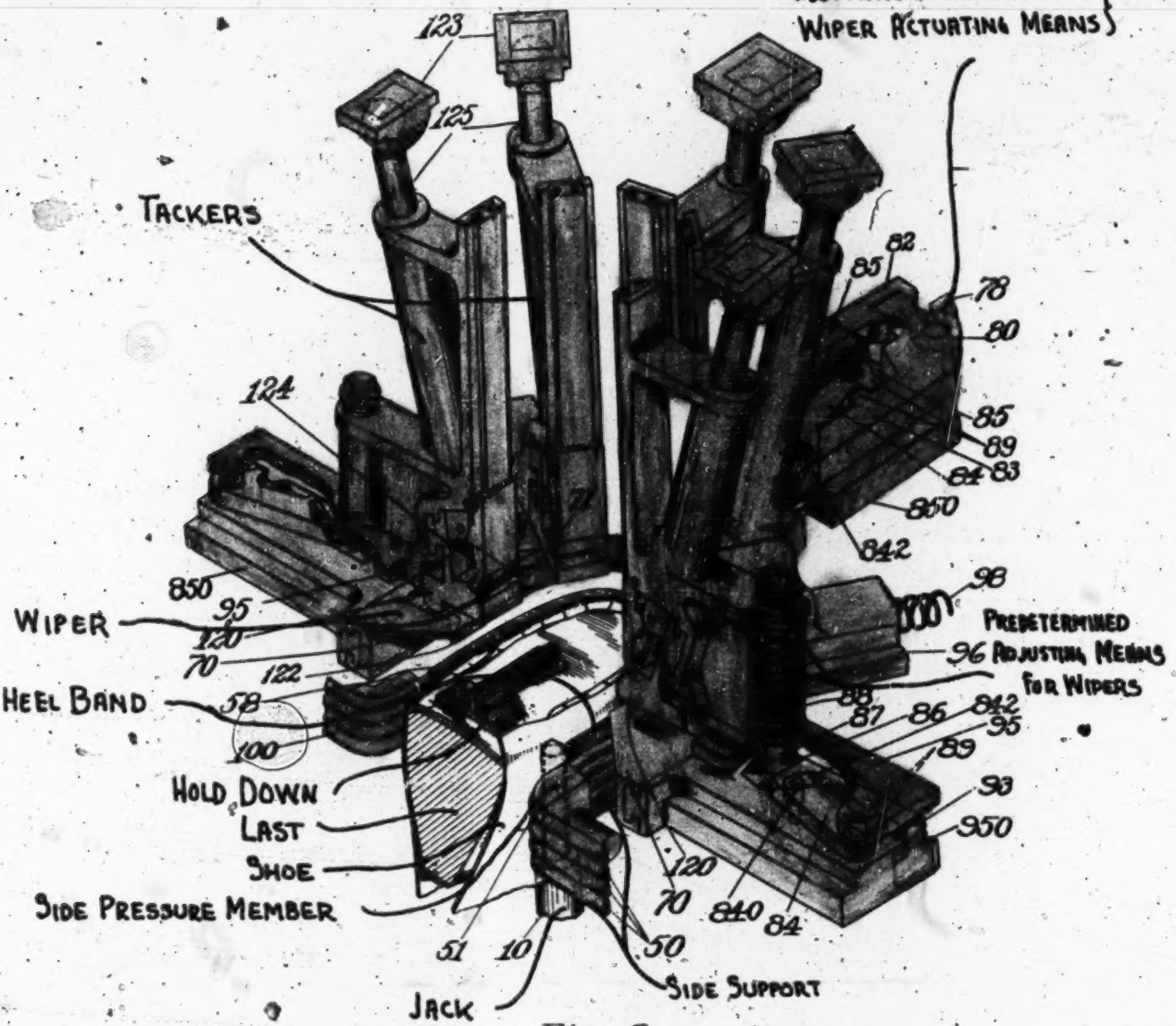


Fig. 8.

WITNESSES:

Elizabeth C. Cook  
Eliot C. Hallbrook

INVENTOR:

Ronald R. Heston  
By his Attorney  
Nelson W. Leonard

## APPENDIX B.

CLAIMS IN SUIT FROM SECOND McFEELY  
PATENT NO. 1,538,737.

6. A machine of the class described having in combination, end lasting wiper plates for closing over a last bottom, **manually operable means determinately to adjust the positions of the wiper plates to initially position the wiper plates to act on the marginal portions at the end of a shoe upper mounted on the last**, means to effect bodily and swinging, movement of the wiper plates to wipe said marginal portions over the bottom of the last into position to be fastened on the bottom of the last, and tacking units co-operating with the wiper plates and having means to maintain them in predetermined relation to the wiper plates in all positions of adjustment of said plates.

23. A lasting mechanism of the class described having, in combination, a substantially U-shaped flexible clamping member to embrace one end of a last and shoe upper, means to support a last and shoe upper with one end positioned within said clamping member, **a movable adjusting member connected to the lower edge of said clamping member at its rear closed end**, means to support the lower edges of said clamping member at opposite sides, pressure members arranged to engage the opposite sides of the U-shaped clamping member at points above its lower edges and to press said sides inwardly to force the end of the upper in close conformity to the last, **manually operable means to move said adjusting member to slide the U-shaped clamping member relatively to said pressure members**, means to operate said pressure members to clamp the shoe upper, and end wiping mechanism to wipe down the edges of the upper over the bottom of the last.

42. A machine of the class described having, in combination, clamping means to embrace one end of a last and shoe, end wipers positioned to operate on the edges of the upper at said end of the shoe, **a hold-down mounted for vertical movement and positioned to engage the bottom of the last and shoe**, a support for a last and shoe constructed and arranged for manually effected movement to engage the last and shoe with said clamping means and hold-down, power operated mechanism effective to move said support



forcibly to press the last and shoe against said clamping means and hold-down and to actuate the clamping means, mechanism effective in timed relation to the clamping means to depress the hold-down and support to position the shoe bottom determinately below the plane of the wipers, mechanism operative to actuate the wipers to break down the edge of the upper over the bottom of the positioned last and shoe, the said hold-down mechanism, being automatically operative subsequently determinately to raise the hold-down, the said power operated mechanism being operative substantially coincidently correspondingly to raise the said support to engage the bottom of the last and shoe with said hold-down with the shoe bottom positioned substantially in the plane of the wipers, and the end wiper mechanism being subsequently operative in timed relation to wipe over and compact the broken down edge of the upper over the bottom of the last and shoe, and manually adjustable means for determinately varying the amount of vertical movement of the hold-down.

85. In a machine of the class described, the combination with last and shoe positioning means, of end embracing wipers, **means for effecting a preliminary adjustment of the wipers to the contour of the shoe**, additional power means for subsequently operating the wipers, and tackers connected to the wipers for preliminary adjustment with them and for power effected movement with the wipers subsequently over the shoe.

91. In a machine of the class described, the combination with last and shoe positioning means, of an end embracing band for clamping the upper round the lateral periphery of an end of the last, supporting means relatively to which the opposite side portions of the band are permitted to slide lengthwise of the shoe, **and means connected to the end portion of the band for adjusting it lengthwise of the shoe and relatively to said supporting means.**